

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03009

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable, and the basis of his discharge be changed to reflect Secretarial Authority.

APPLICANT'S CONTENTIONS

Per counsel, on behalf of the applicant, he began active duty in the Air Force on 17 Apr 12. After witnessing a series of extremely traumatic events while serving as a firefighter, he began self-medicating with alcohol, and in 2014, briefly tried marijuana offered to him by another airman. The applicant ingested so little marijuana, he never even tested positive on a urinalysis. In 2016, the applicant was questioned by the Air Force Office of Special Investigations (AFOSI) during an investigation regarding marijuana use within the unit. Instead of invoking his right to remain silent, which other airmen in the same investigation did, he truthfully told the AFOSI he had tried marijuana a year and a half earlier. As a result, the applicant was administratively separated with a general discharge after almost four years of honorable service and the recommendations of dozens of airmen to retain him.

Further, an administrative investigation revealed the applicant met all the criteria for retention despite his admitted drug use, but was nonetheless separated, causing him to lose the GI Bill. Both at the time, and currently, the applicant was suffering from Post-Traumatic Stress Disorder (PTSD). At the time, he did not seek diagnosis and treatment because he had been warned, and he believed, seeking help would cause him to lose his job. Since his discharge, the Department of Veterans Affairs (DVA) has diagnosed the applicant with PTSD and opined service-related trauma is likely the cause of the drug use that was the basis of his separation from service.

After leaving the service, the applicant was diagnosed with "PTSD with alcohol use disorder" for which he has a 70 percent rating, directly related to his military service. His treating physician later wrote a letter confirming his alcohol and marijuana use were the direct result of trauma he experienced on active duty. Today, the applicant is a husband, father, and a leader in his community. He is hard-working, honest, dependable, and continues to be a selfless public servant in his local fire department where he serves as a lieutenant. He has made the Air Force proud since leaving active duty and is exactly the type of person who deserves a discharge upgrade.

The applicant previously filed a petition to the Air Force Discharge Review Board (AFDRB) and was denied relief in both a records review and in-person appearance. The AFDRB misunderstood and misrepresented (presumably unintentionally) basic facts and timeline information relevant to his claim. Further, the AFDRB denied relief despite the applicant presenting substantial evidence at the hearing which directly addressed and answered concerns raised by the AFDRB in the written review.

The applicant's first traumatic experience occurred in late 2012 to early 2013. Per the applicant's description, his team was dispatched to a family dwelling where he and others rotated

on an attack line. After many rotations, he stepped back in exhaustion and noticed bodies in the yard. He learned they were the husband and wife who lived in the home. Next came the heart-wrenching interactions with family members as they arrived on scene. Soon after, in early 2013, the applicant responded to a motor vehicle accident involving a mother taking her children to school. As the team tried to extricate the family from the vehicle, the applicant watched a young girl die, and then watched the mother's reaction to her son's death. Additionally, while deployed to Jordan, he responded to hundreds of emergencies, many of which were traumatic.

While serving on active duty, the applicant heard from others, and he believed, if he sought mental health treatment, the Air Force would automatically remove him from his job as a firefighter. After his discharge, he continued to struggle with mental health issues and eventually sought help from the DVA, where he was diagnosed with service-connected PTSD.

During the separation process, the applicant met all the criteria to be retained on active duty despite his drug use. According to a signed statement provided by the applicant, his former first sergeant stated neither he nor the commander felt the applicant should be discharged and it was their intention to retain him; however, legal advised against it. Around the same time of the applicant's discharge, the command allowed a different outcome for airmen who also used marijuana but were closer to the end of their term of service. They were permitted to voluntarily separate with an honorable characterization of service. The applicant and his spouse were hurriedly evicted from their on-post housing and experienced a period of homelessness.

On 26 Nov 21, the applicant applied to the AFDRB, and on 29 Apr 22, the AFDRB found there was no evidence the applicant received consequences that were harsher than other airmen who committed similar misconduct. Additionally, the AFDRB found there was no evidence to substantiate the applicant was diagnosed with, or exhibited symptoms of, PTSD during his service. The AFDRB further claimed, incorrectly, the incident(s) of misconduct occurred prior to the applicant's time of events, and deployment, that he contended led to his post-service diagnosis for PTSD-delayed onset. On 28 Mar 23, the applicant participated in a personal appearance hearing with the AFDRB and called two character/fact witnesses who testified favorably for him. The applicant testified there was a stigma attached to seeking mental health treatment and it was known in the department that seeking treatment would have gotten you removed from duty. On 5 May 23, the AFDRB determined his drug use pre-dated his PTSD-triggering event(s) and was likely conducted socially, not for self-medicating a mental health condition. To be clear, this was not true, and the date of his drug use was after he experienced the traumatic events. On 23 May 23, the AFDRB notified the applicant they concluded no change in his discharge was warranted and advised him of his right to apply to the Air Force Board for Correction of Military Records (AFBCMR).

There should be no question the applicant's situation is exactly the type of case to which the Department of Defense (DoD) calls attention through their four memoranda [Guidance to Military Boards¹]. Further, service regulations in effect at the time favored rehabilitation over

¹ Counsel, in his brief, provides as reference: (a) Secretary of Defense Memorandum, *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder*, dated 3 Sep 14; (b) Under Secretary of Defense Memorandum, *Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)*, dated 24 Feb 16; (c) Under Secretary of Defense Memorandum, *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*, dated 25 Aug 17 (also known as the Kurta Memo); and (d) Under Secretary of Defense Memorandum, *Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval*

separation. Moreover, a general discharge was not appropriate because the negative aspects of his conduct were not significant enough to outweigh positive aspects of his military record.

The DoD issued guidance aimed at correcting unfairly harsh outcomes for service members who have silently suffered from service-related PTSD. The AFDRB failed to follow that guidance and misapplied liberal consideration in multiple ways. The AFDRB failed to give proper weight to a DVA determination, and inaccurately asserted lack of evidence of the applicant's PTSD, totally disregarding the guidance for liberal consideration that must be followed. When liberal consideration is properly applied, evidence in the record affirmatively answers the four questions the AFDRB must answer in accordance with the Kurta Memo. The applicant's PTSD excuses or mitigates his discharge.

Furthermore, the undeniable trend in the United States is that marijuana use is increasingly viewed as entirely non-criminal and/or useful for medical purposes, including treatment of PTSD. According to the National Conference of State Legislatures, "As of May 18, 2021, 36 states and four territories allow for the medical use of cannabis products." "As of June 22, 2021, 18 states, two territories and the District of Columbia have enacted legislation to regulate cannabis for nonmedical use." In 2014, shortly after the applicant's isolated use, and before he voluntarily disclosed his use, the South Carolina governor signed SB 1035, *Medical Cannabis Therapeutic Treatment Act*, which authorized clinical trials and the formation of a study committee to develop a plan for the sale and use of medical marijuana in South Carolina. There is further similar legislation pending. It should also be noted that marijuana use by military members is not always wrongful. The Manual for Courts-Martial, United States (2019 Edition), Part IV, paragraph 50 provides both the statutory text at Title 10, United States Code § 912(a) (10 U.S.C. § 912(a)) that establishes Article 112a plus the Commander and Chief's (sic²) additional requirements and explanations. Paragraph 50c(5)(B) specifically acknowledges medical uses, which are not wrongful.

A general discharge characterization is not appropriate as it is not an accurate reflection of the applicant's military service. He completed 3 years, 10 months, and 29 days of active duty service. He has an outstanding military record and served with distinction both at home and overseas, and his enlisted performance reports indicate he consistently ranked as clearly exceeding expectations and had the highest possible ranking in overall performance assessment. The AFDRB heard testimony that his commander, first sergeant, and immediate leadership all wanted him retained in the Air Force but felt pressure from legal to separate him. Today, seven years after his discharge, senior leaders in the Air Force still support the applicant and recommend he receive a discharge upgrade.

The AFDRB found the negative aspects of his willful misconduct outweighed the positive aspects of his military service; however, that conclusion is not supported by the evidence. The only negative documentation he received during his career were a letter of reprimand (LOR) for using marijuana, an LOR from Feb 13 for consuming alcohol as a minor, and a letter of counseling (LOC) for being late for work in Jan 13. All of those instances occurred early in his career after he had first been exposed to very traumatic incidents while serving as a firefighter. The applicant never received any punishment beyond those written reprimands. Under Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, an honorable discharge is appropriate when the quality of the airman's service generally has met Air Force standards of acceptable conduct and performance of duty. In other words, an airman's service does not have to be perfect or without defect to receive an honorable discharge.

Records Regarding Equity, Injustice, or Clemency Determinations, dated 25 Jul 18 (also known as the Wilkie Memo).

² Commander-in-Chief

A discharge upgrade is further warranted to ensure equity because airmen in the same circumstances were treated differently. The AFDRB declined to upgrade his discharge stating there was no evidence the applicant received consequences that were harsher than any other airmen who committed similar misconduct. They know now that is not the case. The only reason the applicant was separated is because he told the truth. There was no real evidence against him; he had never tested positive on a urinalysis, and the incident occurred more than a year and a half before he gave the AFOSI his statement. The Air Force should have rehabilitated the applicant as he met all seven criteria posed by AFI 36-3208 to be retained despite his drug use.

Finally, the applicant's case warrants clemency in accordance with the Wilkie Memo. The applicant voluntarily waived his rights and was forthcoming and truthful in his admission of marijuana use. The Air Force should have prioritized rehabilitation over separation. His service history and use of marijuana are consistent with known scientific literature about the use of marijuana to self-medicate symptoms of PTSD. Today, the use of marijuana in the United States is generally not regarded as serious misconduct. The applicant's misconduct occurred in 2013, approximately seven to eight years ago, and since the incident, he has not had any other arrests, criminal charges, or convictions. As evidenced by letters of support, he has consistently demonstrated he is a person of good moral character who contributes to his community.

The applicant devotes his career to service as a firefighter. Although he continues to struggle with PTSD, he manages it with the help of professional mental health providers. There is no evidence his Air Force command gave any consideration to his trauma; they chose punishment over treatment, which contravened policy at the time and undoubtedly is unacceptable today.

In support of his request for clemency, the applicant provides a personal statement, excerpts from DVA medical records, post-service certificates of achievement, character references, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 11 Jan 13, the applicant was issued an LOC for being late for duty.

On 10 Feb 13, the applicant was issued an LOR for: on or around 9 Feb 13, [the applicant] failed to obey a lawful order and consumed alcohol as a minor.

On 21 Feb 13, according to AF IMT 1058, *Unfavorable Information File (UIF) Action*, a UIF was established and the LOR, dated 10 Feb 13, was placed in that UIF.

On 10 Feb 16, the applicant was issued an LOR for: approximately a year and a half previous, [the applicant] wrongfully used marijuana on two occasions.

On 18 Feb 16, according to AF IMT 1058, the applicant was placed on the control roster based on the LOR, dated 10 Feb 16.

On 4 Mar 16, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, paragraph 5.54.. The specific reasons for the action were:

- On or about 1 Jan 13 and on or about 31 Dec 14, at or near [REDACTED], South Carolina, [the applicant] wrongfully used marijuana on two occasions. For this misconduct, he received a LOR, dated 10 Feb 16, and was placed on a control roster, dated 18 Feb 16.

On 7 Mar 16, the Staff Judge Advocate found the discharge action legally sufficient.

On 9 Mar 16, the discharge authority directed the applicant be discharged for drug abuse, with a general (under honorable conditions) service characterization. The applicant was not eligible for probation and rehabilitation in accordance with AFI 36-3208, paragraph 7.2.6..

On 15 Mar 16, the applicant received a general (under honorable conditions) discharge. His Narrative Reason for Separation is "Misconduct (Drug Abuse)", Separation Code JKK [Misconduct – Drug Abuse], and he was credited with 3 years, 10 months, and 29 days of total active service.

On 26 Nov 21 and 8 Dec 22, the applicant submitted a request to the AFDRB for an upgrade to his discharge.

On 21 Apr 22 and 28 Mar 23, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 7 Mar 24, 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 2 Apr 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided character statements.

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 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 7 Mar 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.

AFI 36-3208, Chapter 1, *General Procedures*:

1.30. *Special Processing Procedures for Airmen Deployed Overseas in Support of a Contingency Operation.* The following additional criteria as stipulated below applies to Airmen who are being recommended for discharge under Chapter 5 of this Instruction and who have been deployed overseas in support of a contingency operation within 24 months prior to initiation of discharge:

1.30.1. Must receive a medical examination in accordance with Chapter 6, paragraphs 6.3. and 6.9.3. of this Instruction. The medical examination must assess whether the effects of post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for administrative separation if the Airman:

1.30.1.1. Is being administratively separated under a characterization other than Honorable; and

1.30.1.2. Was deployed overseas to a contingency operation during the previous 24 months; and

1.30.1.3. Is diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation during the previous 24 months. **NOTE:** In a case involving PTSD, the medical examination shall be performed by a clinical psychologist or psychiatrist. In a case involving TBI, the medical examination may be performed by a physician, clinical psychologist, psychiatrist, or other health care professional, as appropriate; and

1.30.1.4. Is not being separated under a sentence of a court-martial, or other proceeding conducted pursuant to the UCMJ to include request for separation under Chapter 4 of this Instruction.

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge.

There is insufficient evidence to support the applicant suffered from PTSD while he was in the military or at discharge. The applicant was evaluated numerous times, and he was consistently determined to not have any mental health issues. The Psychological Advisor provided a summary of his relevant encounters.

As noted, the applicant reported no mental health issues and providers determined he did not meet the criteria for any mental health condition. His early post-service mental health encounters, likewise, did not diagnose him with PTSD due to any trauma experiences. He was initially service-connected for anxiety related to his involuntary separation from the military. His notes indicate his mood symptoms increased after he was separated from the military, and he had an anxious reaction to getting forced out of the Air Force. They do not mention his mental health condition was the result of trauma. His encounters in service and post-service do not mention any events that might relate to a traumatic experience until 2018 when it is noted he had witnessed deaths and placed people in body bags. In the 2018 encounter, the provider still did not diagnose the applicant with PTSD even after noting he had witnessed deaths and placed people in body bags. He was diagnosed a year later in 2019 with PTSD-delayed onset. The delayed onset designator reflects a worsening of symptoms over time or a re-occurrence (the applicant continued to work as a firefighter post-service) again supporting he did not meet the criteria for PTSD or any other mental health conditions during his service. Regarding his post-service DVA diagnosis, the DVA, operating under a different set of laws, is empowered to offer

compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran.

To be diagnosed with any Diagnostic and Statistical Manual of Mental Disorders diagnosis there must be evidence that, "The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning." In the applicant's case, there is no evidence he had any significant distress in any functional areas while he was in the military. The applicant and counsel contend he met all service criteria for retention. His Enlisted Performance Reports (EPR) all demonstrate he was able to perform his duties. He remained worldwide qualified and was never placed on a duty-limiting condition from a psychological perspective. There is no evidence he was unable to perform the duties of his office, grade, rank, or rating from a psychological perspective. None of his in-service encounters identified any distress from a social or other area (except for a marital stressor that was resolved). While counsel suggests he never went for mental health treatment for fear of being removed from duty, there remains no evidence of mental health concerns in his encounters during his military service.

This psychological advisor agrees with the two prior AFDRB decisions in that the applicant's misconduct occurred before his traumatic experiences, in addition to his not being diagnosed with any mental health condition until after he was discharged from the military. While counsel and the applicant indicate his trauma experiences pre-date his misconduct, there is evidence to suggest the timeline of the events he reported in his self-authored statement (15 Nov 21) may have been inaccurately stated/remembered and occurred later than he reported.

While it is difficult to correlate timelines, the applicant's accounting of events differs from the comments on his EPR. Comparing some of the events/dates he reported on his self-authored statement to his EPRs, it appears the applicant reported the events occurred earlier than they did.

The applicant reported an incident he stated occurred in early 2013 involving a motor vehicle accident working to extract two entrapped children. This incident appears to coincide with a description of an incident listed on his EPR where he helped extricate entrapped occupants in a car accident. This EPR has a start date of Dec 13, which is significantly later than he reported and after his misconduct occurred. He reported his first incident "occurred sometime in late 2012 or early 2013, I do not know the exact date just an estimated date." As the applicant cannot recall the exact dates, it is possible the events he described occurred after his misconduct.

A DVA provider wrote a nexus document for the applicant dated 14 Oct 21. It noted in part: "While active duty, veteran was under significant stress and used cannabis, nicotine, and alcohol as anxiolytics to deal with trauma. Veteran was deployed overseas on a combat mission and worked as a firefighter in Jordan. As a first responder, veteran was involved in witnessing individuals on fire, with "flesh burning" and treating individuals in distress, while also being exposed to active grotesque scenes. Veteran was active in the Air Force from 2012 until 2016 and achieved a rank of E-4. Veteran deployed once in 2015 for six months to Jordan. After a review of the pertinent records, it is my professional opinion that it is highly likely [the applicant's] current psychiatric conditions and military history of Alcohol Abuse and Cannabis and Tobacco Use are a direct result of trauma experienced secondary to his military service."

The provider specifically noted his traumatic experiences occurred in Jordan when the applicant was deployed. His deployment to Jordan was in 2015, approximately two years after his misconduct.

While this nexus letter and other documents report the applicant used alcohol and marijuana to self-medicate his reaction to trauma, there is evidence the applicant used alcohol and smoked marijuana before entering the military. A Disability Benefits Questionnaire, completed on 25 Jun 16, noted under Relevant Substance Abuse History, "Veteran first drank alcohol and smoked marijuana as a teenager." This pre-military use of marijuana and underage consumption of alcohol would therefore not be the result of trauma he experienced in the military. Additionally, his response for underage drinking and marijuana usage at the time, does not appear related to self-medicating any mental health symptoms. He reported it was due to negative influences, peer pressure, and immaturity.

While PTSD can mitigate marijuana usage and underage drinking (self-medicating) and failure to report (avoidance), there is insufficient evidence to suggest the applicant had PTSD or any mental health condition while in the military or at discharge. Even if the applicant had a mental health condition while in the military, there is evidence his misconduct occurred before his reported traumatic events. This psychological advisor determines there are no psychological mitigating factors for the applicant's misconduct of underage drinking, smoking marijuana, or for his failure to report. The applicant did not have any mental health conditions while in the military that would excuse his misconduct from a psychological perspective.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge and insufficient evidence has been presented to support the applicant's request. Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
Counsel contends the applicant has service-connected PTSD.

2. Did the condition exist, or experience occur, during military service?
There is no evidence the applicant had PTSD or any other mental health condition while in service.

3. Does the condition or experience excuse or mitigate the discharge?
While PTSD can mitigate marijuana usage and underage drinking (self-medicating) and failure to report (avoidance), there is insufficient evidence to suggest the applicant had PTSD or any mental health condition while in the military or at discharge. Even if the applicant had a mental health condition while in the military, there is evidence his misconduct occurred before his reported traumatic events. This psychological advisor determines there are no psychological mitigating factors for the applicant's misconduct of underage drinking, smoking marijuana, or for his failure to report. The applicant did not have any mental health conditions while in the military that would excuse his misconduct from a psychological perspective.

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

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 19 Mar 24 for comment (Exhibit F), and the applicant replied on 16 Apr 24. In his response, the applicant contends the

primary question the AFBCMR must answer in this case is whether there is any set of circumstances in which an airman who used marijuana may receive an honorable discharge. Counsel contended he believes there are rare cases where an upgrade is appropriate, even for drug use, and this is that case. He offered a few observations for consideration.

The AFDRB and advisory opinion got the timeline wrong. The applicant experienced the traumatic events before self-medicating with alcohol and marijuana. He never tested positive for marijuana and his brief use did not adversely impact his job performance or mission accomplishment. This is a case of disparate treatment. Testimony at the AFDRB revealed two other airmen also used marijuana; one was allowed to separate with no punishment, and the other refused to speak with the AFOSI and no action was taken. Testimony stated both airmen were honorably discharged.

Liberal consideration was misapplied and abused. The advisory opinion states the applicant did not suffer from PTSD on active duty because it was not in his service treatment records. Whether a diagnosis is contained within a service member's military medical records is not the evidentiary standard and is a misapplication of liberal consideration. The Kurta Memo specifically states mental health conditions, including PTSD, impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterward, and are frequently unreported. The Hagel Memo, dated 3 Sep 14, explains special consideration will be given to DVA determinations which document PTSD or PTSD-related conditions connected to military service. Despite failing to apply the appropriate guidance for liberal consideration, the advisory opinion conceded that PTSD can mitigate marijuana usage and underage drinking (self-medicating) and failure to report (avoidance). If the AFBCMR finds the applicant struggled with undiagnosed PTSD at the time of the misconduct, which evidence in the record supports, then the advisory opinion agrees the misconduct at issue is mitigated by his condition. Relief can also be granted on the basis of clemency, injustice, and the other reasons cited in their petition.

The AFBCMR is the last line of defense for the applicant. He is a loving husband and father who continued to serve the military community as a civilian firefighter. He still works for the DoD and has earned multiple awards from the military since leaving active duty. The AFBCMR is not bound by the AFDRB's decision or the advisory opinion and should exercise its authority to upgrade the applicant's discharge based on the totality of his military service, post-service accomplishments, and all the facts and circumstances involved.

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 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, to include counsel's rebuttal, 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. Despite the applicant's contention regarding his alcohol and marijuana use being an example of self-medicating to treat PTSD symptoms, he did not, at the time of discharge, address his mental health concerns. He further contended he did not seek mental health treatment for fear of losing his job; however, when facing involuntary discharge, it is

more reasonable he, or his Area Defense Counsel (ADC), would raise this issue in support of leniency, rehabilitation, and retention. To the contrary, in the ADC memorandum to the applicant's commander, Subject: Waiver of Discharge Under paragraph 6.60 of AFI 36-3208, dated 29 Feb 16, submitted on the applicant's behalf, it does not raise the issue of mental health at all, but instead states the applicant's drug use was experimental, and curiosity and peer pressure were certainly part of his use.

Further, throughout the applicant's service, and specifically post-deployment, the applicant has denied any mental health concerns during periodic health assessments. On his Jul 15 post-deployment health assessment, the applicant reported "No" to the question, "Did you encounter dead bodies or see people killed or wounded during this deployment." He also answered negatively to questions regarding experiencing symptoms such as nightmares, avoidance, hypervigilance, depression, or hopelessness. His Nov 15 post-deployment health assessment reflects, "Member denies combat injury, TBI, PTSD, depression, substance abuse, tobacco use, relationship or mental health issues." According to the separation authority's memorandum, dated 9 Mar 16, the applicant's discharge complied with special processing procedures for airmen deployed overseas in support of contingency operations, in accordance with AFI 36-3208, paragraph 1.30., and there was no indication his misconduct was a result of PTSD or TBI. His separation history and physical examination reflected, "Depression Screen Negative. Psychiatric, Mood, Euthymic, Affect: Normal; released without limitation." The applicant was medically cleared for separation. If the applicant feared his reporting of mental health issues would result in job loss, that point was moot at the time of his separation physical, yet he still did not report or seek treatment for mental health symptoms. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Additionally, 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. While the applicant contended he received disparate treatment in his general discharge, when compared to two other airmen in similar circumstances, no evidence was provided to determine if the circumstances were comparable and necessitated the same service characterization. Finally, in the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and the limited passage of time since the misconduct and discharge (the Board typically looks for over 15 years of good conduct post-service), the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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-2023-03009 in Executive Session on 18 Jun 24:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 13 Sep 23.
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 7 Mar 24.
Exhibit D: Applicant's Response, w/atchs, dated 2 Apr 24.
Exhibit D: FBI Report, dated, 7 Mar 24.
Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 18 Mar 24.
Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 19 Mar 24.
Exhibit G: Counsel's Response, w/atchs, dated 16 Apr 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