

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03080

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable.

APPLICANT'S CONTENTIONS

The Air Force searched his home without a warrant. They withheld that they were going to drop the physical evidence from his trial. He would not have pleaded guilty if the Air Force did not use the physical evidence (the marijuana roach was not his). He had no positive urine test.

He has depression, adjustment disorder, and anxiety. He was hospitalized in 1986 in a psychiatric ward. He believes [Work-Pro...] Air Force Base (AFB) was on a toxic land field ([Work-Pro...] and [Work-Product]). The toxins he lived over could have affected his judgment and ability to defend himself at trial.

In support of his request for clemency, the applicant provides a personal statement with extracts from Google research he performed, a Department of Veterans Affairs (DVA) Administrative Decision letter, and a DVA Rating Decision letter.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 30 May 91, according to Special Court-Martial Order (SCMO) Number XX, dated 16 Jul 91, the applicant was arraigned at court-martial for the following offenses:

- Charge: Article 112a. Plea: G. Finding: G.
 - Specification 1: [The applicant] did, at [Work-Pro...] AFB, California (CA), on or about 4 Oct 90, wrongfully possess some amount of marijuana (withdrawn after arraignment).
 - Specification 2: [The applicant] did, at [Work-Pro...] AFB, CA, on or about 11 Sep 90, wrongfully distribute some amount of marijuana. Plea: G. Finding: G.
 - Specification 3: [The applicant] did, at [Work-Pro...] AFB, CA, on or about 6 Sep 90, wrongfully use marijuana. Plea: G. Finding: G.

The applicant was sentenced to a BCD and reduction to the grade of airman basic (E-1). The sentence was approved, and except for the BCD, was executed.

On 8 May 95, according to SCMO Number XX, the [applicant's] sentence to a BCD and reduction to airman basic as promulgated in SCMO Number XX, dated 16 Jul 91, has been finally affirmed. Article 71(c) having been complied with, the BCD will be executed. The sentence was adjudged on 30 May 91.

On 16 Jun 95, the applicant received a BCD. His narrative reason for separation is “Court Martial” and he was credited with 13 years and 29 days of total active service.

On 2 Jun 22, according to a DVA Rating Decision letter, provided by the applicant, he was sane during the period in 1990 when the instances causing his unfavorable discharge occurred.

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 29 Mar 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation; however, he has not replied.

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 29 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.

Title 10, United States Code § 1552 (10 USC § 1552) - *Correction of military records: claims incident thereto*

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to:

- (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or;

- (2) action on the sentence of a court-martial for purposes of clemency.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for the desired change to his record based on his mental health condition.

This advisory is limited to the applicant's mental health condition. His contentions related to issues with his court-martial should be addressed by a legal subject matter expert. A review of

the applicant's available and submitted records finds no evidence or records that the applicant had a mental health condition at the time of his convicted misconduct or that his mental health condition was a contributing factor to his misconduct and subsequent BCD from service. The applicant's service treatment records are not available or submitted for review, but his post-service treatment records from the DVA and the DVA Rating Decision letter he submitted found no evidence his mental health condition caused his misconduct and BCD. He was consistent in his reporting that he was hospitalized in 1986 for feeling depressed or in emotional distress from the fallout of his relationship with his wife. However, as the DVA Rating Decision document reported, his records were silent for any further complaint or treatment after 1986 until he was arrested for wrongful use of marijuana in Sep 90. This history and timeline of events would indicate the applicant's mental health and hospital treatment in 1986 and drug-related offenses in 1990 were two mutually exclusive events and had no relation to one another. The DVA was able to assess his service treatment records and found the applicant did not have any mental health problems in 1990 at the time of his misconduct and unfavorable discharge. Again, he previously had marital problems causing him to have anxiety and depression and was treated for adjustment problems in 1986. These same problems and symptoms were not present in 1990. The DVA also found the applicant was considered to be sane at the time of the incident signifying he did not have any mental health condition or issues that would impair his judgment at the time of his misconduct. This would include any alleged toxin exposure the applicant believed caused his impaired judgment or cognitive functioning to defend himself at trial. Moreover, the applicant informed the DVA he believed he was set up by his friend and if this report is true, then it is not possible his mental health condition caused his misconduct. The applicant was convicted at special court-martial for wrongful use and distribution of marijuana. It appeared the applicant admitted to the DVA that he did use marijuana because he reported his friend convinced him to take a puff of his joint. There is no evidence or records he was depressed, anxious, or in emotional distress at the time of his marijuana usage. There is no evidence he used marijuana to cope with his mental health condition. For his convicted offense of distribution, the applicant did not address this offense to the DVA or in this petition. Distribution of an illicit substance typically involves some kind of preparation, planning, or awareness and may be a premeditated behavior. Premeditative behaviors are not excused and cannot be mitigated even by having a mental health condition. After an exhaustive review of the available records, this psychological advisor finds no error or injustice with the applicant's discharge from service from a mental health perspective.

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

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends the Air Force searched his home without a warrant and withheld information that they were going to drop the physical evidence from his trial. He would not have pleaded guilty if the Air Force did not use the physical evidence. The applicant claims the evidence, which was a marijuana roach, was not his, and he had no positive urine test. He reports having depression, adjustment disorder, and anxiety and was hospitalized in 1986 at a psychiatric ward. The applicant also believes Work-Pro... AFB was on a toxic land field and the toxins he lived on could have affected his judgment and ability to defend himself in trial.
2. Did the condition exist, or experience occur, during military service?
The applicant's service treatment records are not available or submitted for review. The submitted DVA Rating Decision letter, dated 2 Jun 22, reported an assessment of his service treatment records found he was treated for marital distress in 1984 and was admitted to the hospital for depression, inability to concentrate, sleep disorders, and continued crying with decreased appetite on 28 Jan 86. His records dated Jun 86 reported the applicant continued to

receive treatment and had a current diagnosis of adjustment disorder versus depression. His records were silent after this time until he was arrested for marijuana use in Sep 90. The DVA determined his records did not show he had mental distress or symptoms at this time, and he did not have continuing mental health problems in 1990. The DVA determined the applicant was sane at the time in question. He would initiate mental health treatment for anxiety and depression and substance abuse treatment with the DVA several years after discharge. There are no records supporting he was exposed to toxins while he was stationed or lived at [Work-Pro...] AFB.

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

There is no evidence or records that the applicant's mental health condition, including anxiety or depression, caused or had a direct impact on his misconduct and BCD. There are no records he had a mental health condition impairing his judgment at the time of his misconduct. There is also no evidence his alleged exposure to toxins caused any impairment to his cognitive functioning. His misconducts were serious offenses resulting in his conviction at special court-martial and could not be excused or mitigated by his mental health condition. The applicant's mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his 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.

In 1991, the applicant pleaded guilty to a charge and one specification each of wrongful use and distribution of marijuana at a special court-martial. He was sentenced to a BCD and reduction in grade to E-1. An appellate review was completed, and the BCD was ordered executed.

The applicant claims the Air Force searched his home without a warrant and he would not have pleaded guilty had he known trial counsel would [not] introduce into evidence the marijuana found in his home. He claims, moreover, his proximity to toxic land at [Work-Pro...] AFB, CA, might have affected his judgment and ability to defend himself at trial.

Because this application pertains to a court-martial sentence, any Air Force Board for Correction of Military Records relief must only be based on clemency rather than error or injustice in accordance with 10 USC § 1552(f). After a thorough review of the available documents, no additional information has been provided by the applicant to suggest clemency in the form of a discharge upgrade is warranted.

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 16 Jul 24 for comment (Exhibit F) but has received no response.

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 USC § 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. 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 the applicant was suffering from a mental health condition at the time of his misconduct. In fact, the DVA Rating Decision letter, provided by the applicant, specifically addressed the applicant's mental health in 1990, during the period of his misconduct, and found the applicant was sane at the time in question, having no mental health condition. Additionally, there is no evidence the applicant was affected by toxins which he contended impacted his judgment and ability to defend himself at trial.

Further, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the court-martial authority's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. Specifically, the applicant pleaded guilty to distribution of marijuana, a premeditated behavior which negates liberal consideration in accordance with the Kurta Memorandum. 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/criminal history provided by the applicant, 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-2023-03080 in Executive Session on 30 Oct 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 23 Aug 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 29 Mar 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 24 Apr 24.
Exhibit E: Advisory Opinion, AF/JAJI, dated 16 Jul 24.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Jul 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