

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03593

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to a general (under honorable conditions) discharge.

APPLICANT'S CONTENTIONS

He was on a third Air Force enlistment when he tested positive for marijuana use and was subsequently court-martialed and received a BCD. His actions at the time were admittedly against Air Force policy, but he had just found out in Jan 85 that his mother had terminal cancer. The applicant was already severely distraught/depressed about being forced to cross-train under Palace Balance from being a Vehicle Operator, a job he loved, into Aircraft Environmental Systems, a job he loathed. The applicant had been drinking more to deal with a job he hated, and after finding out his mother's cancer was terminal, he started smoking marijuana as an escape and got caught. The applicant was court-martialed in Jan 86, left the Air Force in Mar 86, and moved back home (although his DD Form 214, *Certificate of Release or Discharge from Active Duty*, shows a discharge date of 11 Aug 87), and his mother passed away in Sep 86.

The applicant was not aware until Apr 22 that he could request a discharge upgrade. He lived with a BCD for 37 years and has been clean and sober since. The applicant maintains a Class A Commercial Driver's License, is subject to random drug screenings, and has never failed a test. He feels he paid for his mistakes and is respectfully requesting an upgrade to a general discharge.

In support of his request for a discharge upgrade, the applicant provides character reference letters, a copy of his performance report for the period 15 Nov 84 – 14 Nov 85, 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 airman basic (E-1).

On 20 Feb 76, according to AF Form 3070, *Notification of Intent to Impose Nonjudicial Punishment*, the applicant was issued nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ) for:

- Violation of Article 134, UCMJ:

- [The applicant] did, at [Work-Pr...] Air Force Base (AFB), Texas, on or about 19 Dec 75, wrongfully have in his possession 7.26 grams, more or less, of marijuana.

Punishment imposed included forfeiture of \$90.00 of pay and reduction in grade to airman (E-2), with reduction in grade suspended until 20 Aug 76, at which time, unless sooner vacated, would be remitted without further action.

On 6 May 80, according to AF Form 3070, the applicant was issued NJP under Article 15, UCMJ for:

- Violation of Article 134, UCMJ:
 - [The applicant] did, at **Work-Product** Germany, on or about 18 Mar 80, wrongfully use marijuana.

Punishment imposed included reduction in grade to sergeant (E-4), forfeiture of \$325.00 a month for two months, correctional custody for a period of 30 consecutive days, and performance of extra duty for a period of 30 consecutive days. However, execution of that portion of this punishment which provides for forfeiture of pay in excess of \$175.00 a month for two months, and correctional custody for a period of 30 consecutive days, is suspended until 8 Nov 80, at which time, unless sooner vacated, would be remitted without further action.

On 1 Sep 80, according to a XX ASUPS/CC memorandum, Subject: Suspension of Nonjudicial Punishment, the applicant's succeeding commander suspended that portion of the punishment relating to reduction in grade to sergeant (E-4) until 28 Feb 81, at which time, unless sooner vacated, it would be remitted.

On 14 Nov 85, according to AF Form 910, *TSgt, SSgt, Sgt Performance Report*, the applicant's evaluation was referred noting his positive urinalysis.

On 30 Dec 85, according to DD Form 458, *Charge Sheet*, provided by the applicant, the following charges against the applicant were received by the summary court-martial convening authority, and referred for trial to the special court-martial:

- Violation of Article 112a, UCMJ:
 - Specification: In that [the applicant] did, at or near **Work-Product**, New Jersey, between on or about 26 Jun 85 and on or about 26 Jul 85, wrongfully use marijuana.

On 13 Jan 86, according to Special Court-Martial Order (SCMO) Number XX, dated 27 Feb 86 (Second Corrected Copy), the applicant was arraigned and tried at court-martial for the following offenses:

- Charge: Article 112a. Plea: G. Finding: G.
 - Specification: Wrongfully use marijuana, within the continental limits of the United States, between on or about 26 Jun 85 and on or about 26 Jul 85.

On 14 Jan 86, the applicant was sentenced to a BCD, confinement for two months, forfeiture of \$300.00 pay per month for two months, and reduction to the grade of airman basic (E-1). The sentence was approved, and except for the BCD, was executed.

On 13 Mar 86, according to Special Order XX, the applicant was directed to proceed to his home of record and remain there awaiting further orders in connection with the completion of the appellate review of his special court-martial proceedings.

On 22 Jul 87, according to SCMO Number XX, the [applicant's] sentence to a BCD, confinement for two months, forfeiture of \$300.00 pay per month for two months, and reduction to the grade of airman basic (E-1), as promulgated in SCMO Number XX, dated 27 Feb 86, has been finally affirmed. Article 71(c) having been complied with, the BCD will be executed. The sentence was adjudged on 14 Jan 86.

On 11 Aug 87, the applicant received a BCD. His Narrative Reason for Separation is "Conviction by Court-Martial." The applicant was credited with 12 years, 11 months, and 22 days of total active service, with Dates of Time Lost During This Period of 15 Jan 86 through 3 Mar 86.

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

POST-SERVICE INFORMATION

On 22 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 26 Apr 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. While the applicant did not provide information regarding post-service activities, he did provide character reference letters with his original application.

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.

The Board staff provided the applicant a copy of the clemency guidance (Exhibit C) on 22 Mar 24, and a copy of the liberal consideration guidance (Exhibit E) on 27 Jun 24.

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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor found insufficient evidence to support the applicant's request for the desired change to his records.

A review of the applicant's objective military records finds the applicant's contentions are plausible, but there is no actual evidence or records to support his contentions. His objective military records revealed he submitted a statement in his response to his referral performance report alleging twice in the same statement that his positive urinalysis (UA) for an unidentified substance (presumably marijuana because of his special court-martial records and his statement for this petition) was the result of a false reading. The applicant's statement would suggest he questioned or denied testing positive for an illicit substance/marijuana which, in turn, would also imply he denied using marijuana. If the applicant denied using marijuana or claimed the positive UA was from a false reading, then it is not possible his mental health condition or his grief and loss over his mother's terminal illness had caused him to use marijuana to cope. The applicant did not discuss or report he used marijuana to cope with his mother's terminal cancer in his referral performance report and, in fact, there is no mention of his mother whatsoever in his statement. There was also no reference to the applicant experiencing any stress or mental health issues that led to his marijuana use in the statement. There are no records of his mother's illness or death, i.e., death certificate, to corroborate his contention that he was experiencing emotional distress over her illness and used marijuana to cope. Again, this situation is plausible, but more information is needed for his sole testimony to be supported and credible. It is acknowledged the applicant had a behavioral change and he had at least 10 years of good service before his positive UA for marijuana use. His marijuana use did not appear to be a regular behavior of his, so his contention that he used marijuana to cope with a change in his life is probable. Nevertheless, the applicant also claimed that before he used marijuana, he used alcohol to cope with having to cross-train to a new Air Force Specialty Code (AFSC) that he loathed. There is evidence the applicant did cross-train from being a Vehicle Operator/Dispatcher to an Aircraft Environmental

System Specialist and was performing duties in the latter AFSC for at least three years starting on 15 Nov 82 before his marijuana use. It is possible he was stressed from his job and used alcohol to cope as contended, but there are no records the applicant had any alcohol issues or had engaged in any alcohol-related incidents during service. Additionally, the applicant's alcohol use was not the cause of his discharge. There are no records he had received any mental health evaluations, treatment, or mental disorder diagnosis during service. There are no records to substantiate the applicant had any mental health conditions, including depression or dealing with grief and loss during service. There are no records the applicant continued to experience depression and/or had substance abuse problems following his discharge from service. There is no evidence or records that he was ever diagnosed with any mental disorders or had a mental health condition in his lifetime. Although this Psychological Advisor concedes the applicant's contention is conceivable, it is difficult to support his request to upgrade his discharge from a BCD, which had resulted from a special court-martial conviction, especially since his objective military records may have offered a different narrative than his contentions. He also submitted no records to support his claims. More information is needed from the applicant. At this time, this Psychological Advisor finds no error or injustice with his discharge from a mental health perspective. There is no evidence his mental health condition had a direct impact or was a contributing factor to his discharge. Therefore, 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 request due to his contention of having a mental health condition. It is reminded liberal consideration does not mandate an upgrade per policy guidance. The following are responses 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 contended he coped with his mother's terminal cancer with marijuana during service. Before he learned of her terminal illness, he was drinking alcohol to cope because he was distraught and depressed with having to cross-train to another AFSC that he loathed.
2. Did the condition exist, or experience occur, during military service?
The applicant's service treatment records are not available or submitted by the applicant for review. There is no evidence or records to confirm he had any mental health conditions including depression or grief and loss (bereavement) that had existed or occurred during his military service.
3. Does the condition or experience actually excuse or mitigate the discharge?
Although the applicant's contention of coping with his mother's terminal illness with marijuana is plausible, there is no actual evidence or records of any of these events. He reported at the time in service that his positive UA was from a false reading implying he denied using marijuana. More information is needed from the applicant to support his contention and request. The existing records find no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his discharge. Thus, 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 mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 5 Aug 24 for comment (Exhibit G) 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 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, 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. There are no records he had received any mental health evaluations, treatment, or mental disorder diagnosis during service. There is also no evidence or records to substantiate the applicant had any mental health conditions, including depression or grief and loss (bereavement) that had existed or occurred during his military service. Furthermore, the existing records find no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his discharge. Additionally, the applicant's contention that he started smoking marijuana as a coping mechanism to deal with the stress of cross-training and his mother's illness is contradicted by his two previous nonjudicial punishment actions for possession of marijuana and marijuana use, in 1976 and 1980, respectively.

Finally, 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. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, 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-2023-03593 in Executive Session on 19 Feb 25:

, 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 21 Oct 23.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 22 Mar 24.
Exhibit D: FBI Report, dated 26 Apr 24.
Exhibit E: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 27 Jun 24.
Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 1 Aug 24.
Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Aug 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