

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00488

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded.

APPLICANT'S CONTENTIONS

He is seeking closure and to see if he is eligible for any Veterans Administration benefits. The applicant considered going through this process twice in years past (1995 and 2008). He would be untruthful if he stated that what he experienced has not negatively affected him, but he has never let it hinder or consume him. He had to continue living his life and be as productive as he could be. The applicant can confidently and proudly say since his separation from the armed forces, his life has been very productive. In 1995, a retired senior master sergeant strongly recommended the applicant should make an effort to share his story and seek some resolution. However, he chose not to as he was focused on his career in the financial industry at that time, which was going extremely well. In 2008, he decided to try another attempt at the process after consulting with a military attorney whose specialty focused on his type of situation. The applicant became discouraged and disappointed because the cost to retain the attorney was extremely expensive and he chose not to move forward. In support of this request, the applicant provided details of his pre-service history.

After basic training and technical school, the applicant was stationed at his first base, arriving on 10 Nov 84. In Jul 85, there was an investigation by the Office of Special Investigation of illegal activity at the base and several airmen were involved. At that time, the applicant concluded the reason he was initially questioned was because several of his co-workers were allegedly involved. After several weeks, the applicant was questioned again, and during this session, he was accused of possessing some pills called "white crosses." The applicant stated he is not only innocent, to this day he still does not know of any "white crosses" pills. The time the applicant was accused was Jul 84 – Aug 84, keeping in mind he did not join the Air Force until Jul 84 and arrived at his base in Nov 84.

Needless to say, the applicant was completely dumbfounded and did not remotely understand what was happening and how he was involved in the ordeal. From the time he arrived at his base, he was taking night courses through the community college and did not have a lot of time to communicate or engage with his colleagues outside of work. The applicant was appointed a military lawyer, and the lawyer told him it was an "undeniable case of mistaken identity." The applicant was never informed of the identity of his accuser. The applicant was summoned to an Article 32 hearing where his accuser was questioned by his attorney during which there were many untruths and discrepancies uncovered. Upon completion of the hearing, the applicant was informed at most he would receive an Article 15, counseling, and be cleared. As the months progressed, the applicant was never questioned again, but several airmen received disciplinary action for their involvement, including incarceration. Believing this ordeal to be over, as far as his involvement, the applicant was totally baffled and confused when he was offered an administrative discharge. The applicant was advised to refuse the offer as they were sure it would reveal he was not even stationed at the base when the allegations/offenses occurred. The

applicant did seek psychological help and went to mental health to help him deal with the anger, frustration, and disbelief he was experiencing. After several airmen were given incarceration and discharge, the applicant decided it was not worth the risk and he accepted the administrative discharge.

The applicant stated he provided the pertinent information to substantiate his claim, prove his innocence, and disclose how unfair and unjust the ordeal was for him. The applicant has had a productive life and successful career in management for over 20 years. To this day, the applicant has never been involved in any criminal activity, never dealt with drugs or substance abuse, nor has he been incarcerated. The applicant has always been employed, positively contributed to his community, and does the best he can to be a great father to his daughter. The applicant is currently a project manager for a logistics company. Before his current employment, the applicant held positions in corporate security, law enforcement, and the financial industry. The applicant also became a homeowner, a feat of which he is most proud. The applicant feels strongly he is deserving of consideration to right a grievous wrong that was committed against him and receive some benefits for his military service.

In support of his request for clemency, the applicant provides a personal statement, copies of airman performance reports, a copy of his technical school certificate, 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 airman (E-2).

On 3 Dec 85, according to DD Form 458, *Charge Sheet*, the following charges against the applicant were received by the summary court-martial convening authority:

- Violation of the Uniform Code of Military Justice (UCMJ), Article 112a:

- Specification 1: In that [the applicant], United States Air Force, Headquarters XXX Air Base Group, did, at or near [Work-Prod...] Air Force Base (AFB), California (CA), at divers times, during the period from on or about 1 Mar 85 to on or about 1 May 85, wrongfully possess some quantity of cocaine, a Schedule II controlled substance.

- Specification 2: In that [the applicant], United States Air Force, Headquarters XXX Air Base Group, did, at [Work-Product], CA, during the period from on or about 1 Sep 84 to on or about 1 Nov 84, wrongfully use methamphetamine, a Schedule III controlled substance.

- Specification 3: In that [the applicant], United States Air Force, Headquarters XXX Air Base Group, did, at [Work-Product], CA, during the period from on or about 1 Sep 84 to on or about 1 Nov 84, wrongfully use marijuana, a Schedule I controlled substance.

On 6 Jan 86, according to an Area Defense Counsel memorandum, the applicant requested he be discharged from the Air Force according to Air Force Regulation (AFR) 39-10, *Administrative Separation of Airmen*, Chapter 4, in lieu of trial by court-martial.

On 21 Jan 86, the applicant's commander recommended the applicant's request for discharge in lieu of trial by court-martial be approved. On this same date, the Staff Judge Advocate found the discharge action legally sufficient.

On 29 Jan 86, the discharge authority directed the applicant be discharged under the provisions of AFR 39-10, Chapter 4, with a UOTHC service characterization. Probation and rehabilitation were considered, but not offered.

On 7 Feb 86, the applicant received a UOTHC discharge. His narrative reason for separation is "Request in Lieu of Trial by Court-Martial" and he was credited with 1 year, 6 months, and 20 days of total active service.

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 22 Feb 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 Post-Traumatic Stress Disorder (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 22 Feb 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge based on his mental health condition.

This advisory is limited to the applicant's mental health condition. Contentions regarding his accuser's accusations/reports, inconsistent timelines, Article 32 hearing, and other legal issues surrounding his discharge should be addressed by a legal subject matter expert. 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 reason for discharge in lieu of a court-martial. He had requested a discharge in lieu of a court-martial after he was referred to a general court-martial for the offenses of possessing cocaine and using methamphetamine and marijuana. The applicant had consistently denied the allegations. He denied all allegations during service and denied possessing "white crosses" pills in his petition. The applicant did not specifically address his offenses of methamphetamine and marijuana usage in his petition. Since he denied engaging in the misconducts or offenses he was accused of that were documented in his military records,

then it is not possible his mental health condition caused any of his misconducts or offenses. As the applicant contended, there is evidence he was seen at the Mental Health Clinic (MHC) during service on 4 Dec 85, 5 Dec 85, and 6 Dec 85 due to having problems with sleeping, eating, concentrating, and losing interest caused by the stressors from his legal issues. The applicant was given a disorder or condition of Other Life Circumstance Problems. There is no evidence he had or was diagnosed with PTSD or a similar condition during service or in his lifetime. The applicant's emotional distress was in response to, or the result of, his legal issues. His reaction to these stressors is not uncommon and is comprehensible as this is a highly stressful situation. There is no evidence the applicant had a mental health condition or issues before or during his misconduct, and he had no mental health concerns before his legal troubles. The applicant may have been stressed when he decided to submit his request for discharge but as the applicant had explained in his petition, he decided it was not worth the risk to go to trial and accepted the administrative discharge despite his legal counsel advising him to reject the discharge offer. The applicant decided (with legal consultation) to request an administrative discharge based on what he believed was most appropriate for him. It appeared the applicant spent some time deliberating his options and there is no evidence his decision was made in haste or was impulsive. There is no evidence he had any cognitive or intellectual impairments at the time he made his decision to submit his request for discharge. Thus, from the available records for review, this Psychological Advisor finds no error or injustice identified with his discharge from a mental health perspective.

Liberal consideration is applied to the applicant's petition 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 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 denied possessing any "white crosses" pills, being involved in any criminal activity, dealing with drugs or substance abuse, and being incarcerated. He sought psychological help and went to the MHC to help him deal with the anger, frustration, and disbelief he was experiencing because of his legal problems. The applicant marked "PTSD" and "OTHER MENTAL HEALTH" on his application to the Board and provided no information about his condition of PTSD, did not identify his other mental health condition, and did not discuss how his mental health condition may excuse or mitigate his discharge.
2. Did the condition exist, or experience occur, during military service?
There is evidence the applicant had briefly sought and received mental health treatment at the MHC during service on 4 Dec 85, 5 Dec 85, and 6 Dec 85 for problems with sleeping, eating, concentration, and loss of interest caused by his legal problems. The applicant was given a diagnosis or condition of Other Life Circumstance Problems. There is no evidence he had or was diagnosed with PTSD or a similar condition during service or in his lifetime.
3. Does the condition or experience actually excuse or mitigate the discharge?
The applicant's mental health condition or emotional distress was in response to, or the result of, his legal problems. There is no evidence he had a mental health condition including PTSD or issues prior to or at the time of his misconduct or that his mental health condition had caused his misconducts or offenses that were referred to a general court-martial. The applicant requested a discharge in lieu of a court-martial because he thought the risk of rejecting the discharge offer was not worth it despite his legal counsel advising him to reject the offer. The applicant decided (with legal consultation) to request an administrative discharge based on what he believed was most appropriate for him. It appeared the applicant spent time deliberating his options and there is no evidence his decision was made in haste or was impulsive. There is no evidence he had any cognitive or intellectual impairments at the time he made his decision to submit his request for discharge. Therefore, the applicant's 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.

DAF/JAJI recommends denying the application because there is insufficient evidence to demonstrate a legal error or injustice.

On 6 Jan 86, the applicant requested discharge in lieu of trial by court-martial, pursuant to AFR 39-10, Chapter 4. The request was signed by the applicant and his defense counsel. In that request, the applicant acknowledged the following: "I understand that if this request is approved I may be discharged under other than honorable conditions, regardless of your recommendation. I am aware of the adverse nature of such a discharge and the possible consequences thereof. I know that it may deprive me of veterans benefits."

On 3 Dec 85, one charge and three specifications were preferred against the applicant for wrongful use of methamphetamine and marijuana, and possession of cocaine, in violation of Article 112a, UCMJ. The applicant's case was the subject of a preliminary hearing, pursuant to Article 32, UCMJ, on 5 Dec 85. The investigating officer determined "reasonable grounds exist to believe that the accused committed the alleged offenses," and recommended trial by general court-martial. The case file provided does not indicate whether the case was ultimately referred. Due to evidentiary issues highlighted in the staff judge advocate's legal review of the applicant's request for discharge in lieu of trial by court-martial, the chain of command concurred with the request, and the applicant was discharged with a UOTHC service characterization.

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 decision of a military corrections board under an "unusually deferential application of the 'arbitrary or capricious' standard").

A rational factfinder could conclude a UOTHC service characterization was appropriate based on the preferral of drug-related offenses against the applicant. Reasonable inferences from the evidence support the decisions of the principals who resolved questions of fact and took the actions at issue. All procedural and due process requirements were complied with. The applicant signed acknowledgement of the possible consequences of discharge in lieu of trial by court-martial, to include a UOTHC service characterization. He received the benefit of the bargain. The applicant avoided trial by court-martial and the associated risks, such as a criminal conviction and incarceration.

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 15 Oct 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 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 the rationale and recommendation of DAF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence the applicant had or was diagnosed with PTSD or a similar condition during service or in his lifetime. The applicant's emotional distress was in response to, or the result of, his legal issues. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. Additionally, the applicant, with legal consultation, requested discharge in lieu of trial by court-martial, acknowledging the possibility of a UOTHC discharge and loss of veteran's benefits.

Further, 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/criminal history provided by the applicant, 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-2024-00488 in Executive Session on 18 Dec 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 8 Jan 65 (sic).
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 22 Feb 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 18 Jul 24.
Exhibit E: Advisory Opinion, DAF/JAJI, dated 3 Oct 24.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Oct 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