

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2024-01522

XXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to an honorable discharge, his narrative reason for separation changed from "Misconduct (Drug Abuse)" to "Secretarial Authority" and his separation code of "JKK" changed to a corresponding code.

### APPLICANT'S CONTENTIONS

Per counsel, the applicant enlisted in the Air Force on 29 Apr 13. He completed Basic Military Training in Jun 13, Combat Control Selection Courses in Jul 13, Air Traffic Control Apprentice in Mar 14, and the Air Force Training course in Jan 15. The applicant received nonjudicial punishment and was discharged on 7 Nov 17 with a general discharge for Misconduct (Drug Abuse). The applicant appealed for an upgrade of his reenlistment eligibility code and was denied on 12 Nov 20.

In support of his argument and timeliness, counsel referenced Title 10, United States Code § 1552 (10 USC § 1552) and Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. Counsel contended the Air Force made a material error in separating the applicant with an "under honorable conditions" discharge as the chain of command erred in its discretionary powers when it charged the applicant with drug abuse on one occasion rather than providing him with the necessary rehabilitative services. The demands of the Air Force played a significant role in the deterioration of the applicant's mental and physical well-being. The applicant displayed great difficulty in coping with his emotional and physical distress. The chain of command did not give the applicant the option to cater to his mental health, even after he notified the command and several of his fellow airmen. As a result, the applicant resorted to self-medicating after his pleas for help were ignored. Counsel further provided excerpts from Under Secretary of Defense for Personnel and Readiness (USD P&R) memorandum, Subject: Clarifying Guidance to Military Discharge Review 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 (Kurta Memorandum) in support.

The applicant clearly suffered from emotional and physical stress from his failure to conform to the demands of the Air Force. After his transfer to his new base, the applicant sought refuge in his fellow airmen and commanding officers. Unfortunately, not one single person came to his avail, nor did his commanding officers seek to provide the applicant with the option for counseling services. As a result, the applicant's emotional distress affected his capabilities and performance. However, he still tried to endure and persevere through his distress. The Air Force chose to rid themselves of a nuisance instead of helping a fellow airman. Furthermore, the applicant provided testimony about his difficulty in conforming to the demands of the Air Force and taking full responsibility for his failures and choices. He resorted to self-medicating to try and cope while suffering from emotional trauma and depression from the physical and sexual abuse of his stepfather. Counsel provided an excerpt from the lengthy personal statement provided by the applicant in support of this contention. The Air Force erred in their discretion

when they chose to discharge the applicant for his one-time use of marijuana rather than providing him with the necessary counseling and rehabilitative services for his emotional distress.

According to counsel, the applicant has been improperly stigmatized and harmed by his discharge causing a material injustice, which various courts have recognized. Courts have acknowledged this stigma, illustrating, "Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community." *Sofranoff v. United States*, 165 Ct. Cl. 470 (Ct. Cl. 1964). In this instance, the applicant took full accountability for his actions for the nonjudicial punishment he received for the one-time use of marijuana, following his inability to combat depression and the emotional trauma from the physical and sexual abuse he endured from his stepfather. He has invested his efforts in becoming the best private citizen he could be. After being discharged, the applicant worked as a FedEx forklift operator in the evenings to finance his college tuition and living expenses. Following his career with FedEx, the applicant was employed as a ministry leader while pursuing a Bachelor of Arts degree in Humanities. Throughout the years, the applicant has displayed perseverance, responsibility, and emotional maturity, which he has continued to exhibit throughout his career as a youth ministry leader. Moreover, the applicant focused on his emotional recovery by seeking therapy from a 12-step recovery program. Additionally, the applicant has provided several character statements speaking to his incredible qualities, performance, and accomplishments. Counsel provided excerpts from the reference letters provided by the applicant.

Counsel summarized it is evident from the character statements the applicant has positively affected many individuals and clients and has led an honorable life. Therefore, it would be a clear injustice to refuse the applicant a discharge upgrade. The applicant has grown and matured from his minor mistake, succeeded in the face of adversity, and thus deserves the opportunity to live his life free of the burdens of childish decisions made nearly seven years ago.

In support of his request for a discharge upgrade, the applicant provided a personal statement, letters of recommendation and support, including a letter from the applicant's spouse, a copy of his resume, a copy of an Air Force Discharge Review Board (AFDRB) Decisional Document, dated 12 Nov 20, and a copy of the Kurta Memorandum.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a former Air Force airman (E-2).

According to AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, for the period 1 Apr 16 – 31 Mar 17, the applicant "used of (sic) illegal drugs, for which he was found guilty in a court-martial under Article 112 of the UCMJ [Uniform Code of Military Justice]."

On 31 May 17, according to a memorandum from the applicant's rater, Subject: Referral Enlisted Performance Report, the applicant's evaluation was referred due to the rater's comments "pertaining to your [the applicant's] illegal drug use."

On 7 Nov 17, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct (Drug Abuse)" and his separation code is "JKK" [Misconduct – Drug Abuse]. The applicant was credited with four years, six months, and nine days of total active service.

On 30 Jul 18, the applicant submitted a request to the AFDRB for an upgrade to his discharge.

On 25 Jul 19, the AFDRB denied the applicant's request for upgrade. A decisional document was not available for review.

On 28 Jul 20, the applicant submitted a request to the AFDRB for an upgrade to his discharge, with a personal appearance.

On 3 Nov 20, the AFDRB found insufficient evidence of an inequity or impropriety that would warrant a change to the applicant's discharge. Upon review of the applicant's service record, the AFDRB was unable to find any documentation regarding the applicant's discharge. Since the AFDRB relies on the presumption of regularity, it concluded the discharge received by the applicant was appropriate. After a thorough review of the applicant's service record and input from the AFDRB psychiatrist/psychologist, the AFDRB found no conclusive indication that any mental health issues had a direct impact on the applicant's misconduct or discharge.

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

## **POST-SERVICE INFORMATION**

On 25 Sep 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. The applicant did provide post-service information with his original application.

## **APPLICABLE AUTHORITY/GUIDANCE**

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?

- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to paragraphs 6 and 7 of the Wilkie Memo.

On 25 Sep 24, the 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.

## AIR FORCE EVALUATION

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

This Psychological Advisor has reviewed the available records and finds no evidence or records to support the applicant's and his legal counsel's contentions. There is noticeable and numerous inconsistent reporting. His legal counsel repeatedly claimed the applicant had a "one-time use of marijuana" and made no mention of any mushroom usage. The applicant, on the other hand, wrote in his personal statement to the AFBCMR that he used mushrooms during a camping trip and thereafter had used marijuana when he would attend a few concerts with his girlfriend and her friends. Furthermore, the applicant provided a sworn oral testimony to the AFDRB attesting he "used marijuana and mushrooms a (sic) 3-4 times within a few weeks." His Enlisted Performance Report also identified the applicant used "illegal drugs" suggesting he used more than one drug. The applicant's testimonies and his military records clearly contradict his legal counsel's contention.

The applicant and his legal counsel contended he was experiencing anxiety, depression, emotional distress, and emotional pain caused by his work stress/environment and his unresolved physical and sexual abuse from his stepfather. It is noted the abuse from his stepfather occurred before he entered the Air Force and there is no evidence the trauma from this abuse was aggravated by his military service. These experiences supposedly caused him to use drugs to cope. While these experiences are plausible, there is no evidence or records the applicant used

drugs to cope with his mental health condition developed from these experiences and stressors. His service treatment records revealed he continuously denied having had any mental health issues or concerns on four of his annual fly Periodic Health Assessments (PHA) from 17 May 13 to 12 Sep 16. The applicant also denied having any mental health issues, including anxiety and depression, on his Separation History and Physical Examination (SHPE) on 25 Jan 17. It was not until two days after his SHPE on 27 Jan 17 that the applicant presented to the Mental Health Clinic (MHC) for complaints of Obsessive-Compulsive Disorder (OCD) and experienced stress from his pending court-martial and a breakup with his girlfriend. Since the applicant denied having any mental health conditions or issues in his annual fly PHAs and SHPE before this initial encounter with the MHC when he disclosed his court-martial, then there is no evidence he used drugs to cope with his mental health condition because his mental health condition did not exist or occurred at the time of his drug use. Additionally, there is no evidence the applicant had a mental health condition or was in emotional distress at the time of his drug use because he denied he had any mental health issues around that time. The applicant reported his girlfriend broke up with him because of his court-martial so this stressor was a consequence of his drug use/misconduct. There was no report of any anxiety and depression caused by his work stress/environment sans his court-martial proceeding or his childhood abuse experiences. The applicant was fully evaluated a few days later and, at this time, he denied he was stressed about his court-martial because he had come to terms with it and denied he had used illegal or illicit drugs in the past. There was no reference again to any anxiety and depression caused by his work stress and past traumatic experiences and, in fact, he reported having "minimal stressors about his social life and about his work life." The applicant did report having some isolation because he was trying to establish new sets of friends since the incident, presumably related to his court-martial, and mentioned having an eating disorder. Despite these problems, the applicant was assessed to not meet the diagnostic criteria for OCD or any other mental health conditions, including anxiety and depression. He would contact the MHC several months later on 6 Sep 17 and, this time, reported he was experiencing work and relationship stressors and had consulted with a chaplain. The applicant was evaluated again a few weeks later on 25 Sep 17 and endorsed problems and symptoms of having low energy, sadness, negative thinking, compulsive eating, obsessive thinking, indecisiveness, could not stop thinking about his ex-girlfriend, and sometimes feeling depressed. He said these problems have occurred for about 7-9 months and the factors related to the onset of his problem were "getting d/c'd [discharged] after hearing, has been court martial (sic)." He was given a diagnosis of Adjustment Disorder with Depressed Mood. The applicant's anxiety and depressive symptoms were caused by his court-martial and discharge as a result of his misconduct (and break-up with his girlfriend) and not from his work stress that occurred before his court-martial or discharge action and prior service traumatic experiences. He repeated this similar narrative that his stressors, anxiety, and depression were due to his court-martial and break-up during his last annual fly PHA on 3 Oct 17 and to his provider at the Department of Veterans Affairs on 19 Mar 21. The applicant never reported to his providers he coped with his mental health condition and stressors with drugs and denied he used any illegal/illicit drugs in the past during service. His various reports to his medical and mental health providers at the time of service were clearly inconsistent. Another inconsistent reporting by the applicant was his testimony to the AFDRB. He told the AFDRB that "he used drugs because his trainers did and his girlfriend did" and "He states it wasn't because of depression but he did feel stressed from his job" in reference to his drug use. The applicant denied to the AFDRB that his depression caused him to use drugs, and his testimony would dispute his and his legal counsel's contention that he coped or self-medicated his mental health condition with drugs. The applicant's testimony to the AFDRB was vastly different than his current contention to the AFBCMR. Neither the applicant nor his legal counsel addressed this inconsistent reporting. Due to his inconsistent reporting, it is difficult to determine which testimony or version of events had actually occurred, but his objective military records and service treatment records find no evidence his mental health condition had a direct impact or was a contributing factor to his drug use and discharge.

The applicant's official discharge paperwork is not available or submitted by the applicant for review. This creates another issue to support the applicant's request. There is evidence and reports that he was convicted at a court-martial for illicit drug use, but the actual trial of court records is unavailable. He claims he used marijuana and mushrooms on a few occasions and there are no records to corroborate his reports. The applicant could have been convicted for other types of drug use, frequency of drug use, and other activities associated with drugs. These potential activities and misconduct could not be confirmed at this time. His DD Form 214, *Certificate of Release or Discharge from Active Duty*, did report he was discharged for the reason of Misconduct (Drug Abuse); however, AFI 36-3208, *Administrative Separation of Airmen*, states, "Drug Abuse" may encompass drug use, distribution, possession, trafficking, handling, sale, etc. From the applicant's personal statement, he made it a point to deny he helped an airman acquire and sell drugs and did not sell or buy drugs with his colleagues. His witness testifying at the AFDRB hearing referenced a drug ring. The applicant had demonstrated he is not quite a reliable historian so it is possible he may have other misconduct issues besides his self-reported drug use. The applicant's discharge paperwork would clarify this issue. Since his discharge paperwork is unavailable, the presumption of regularity is applied and there is no error or injustice with his discharge from service from a mental health perspective. His request for the desired changes to his records based on his mental health condition is not supported due to insufficient evidence.

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 information presented in his records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant and his legal counsel contended he was experiencing anxiety, depression, emotional distress, and emotional pain caused by his work stress/environment and his unresolved physical and sexual abuse from his stepfather. These experiences supposedly caused him to use drugs to cope, resulting in his discharge from service. The applicant's legal counsel claimed he engaged in a "one-time use of marijuana," but the applicant said in his personal statement he used mushrooms during a camping trip and marijuana when he attended a few concerts with his then-girlfriend and her friends.

2. Did the condition exist, or experience occur, during military service?

There is no evidence the applicant's anxiety, depression, and/or emotional distress and pain caused by his work stress/environment and prior service abuse experiences had existed or occurred during his military service. During his last mental health evaluation during service in Sep 17, the applicant reported having anxiety and depressive symptoms for the past 7-9 months and the factor causing his symptoms was getting discharged after being convicted at court-martial. He made other reports that he was stressed due to his court-martial and break-up from his girlfriend. The applicant's anxiety and depressive symptoms were in response to the consequences of his misconduct and there was no evidence they had pre-dated his misconduct or had occurred during his misconduct. He was given a diagnosis of Adjustment Disorder with Depressed Mood for the situational stressor surrounding his discharge.

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

There is no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his discharge. There is no evidence or records he coped with his mental health condition or self-medicated with drugs. Since the applicant's discharge paperwork is unavailable, the actual and full reasons for his discharge are unknown; consequently, the presumption of regularity is applied resulting in no error or injustice identified with his discharge from service from a mental health perspective. Therefore, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit D.

### **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 30 Sep 24 for comment (Exhibit E) 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 finds a preponderance of the evidence does not substantiate the applicant's contentions. There are noticeable and numerous inconsistencies within the applicant's petition to the Board. Counsel's contentions regarding the applicant's "one-time use of marijuana" are directly contradicted by the applicant's personal statement where he describes taking mushrooms during a camping trip and while attending a few concerts, using drugs that were available, usually marijuana. The applicant's testimony to the AFDRB regarding the reason for his initial drug use also contradicts his statement in his petition to this Board. Additionally, despite his contentions regarding self-medicating as a coping mechanism, there is no evidence the applicant had a mental health condition or was in emotional distress at the time of his drug use. Further, the applicant denied having any mental health issues, including anxiety and depression, on his SHPE on 25 Jan 17. Due to the applicant's contentions of having a mental health condition in his application to the Board, liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Finally, in the absence of documentation detailing the applicant's discharge, the presumption of regularity is applied, finding the applicant's discharge was appropriate. 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 discharge, 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-2024-01522 in Executive Session on 15 Jan 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 11 Apr 24.  
Exhibit B: Documentary Evidence, including relevant excerpts from official records.  
Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 25 Sep 24.  
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 26 Sep 24.  
Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 30 Sep 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

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Board Operations Manager, AFBCMR