



**CUI//SP-MIL/SP-PRVCY**

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

*Work-Product*

**DOCKET NUMBER:** BC-2021-01550

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

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

**APPLICANT'S CONTENTIONS**

His service-connected back injury led to his addiction to pain killers which resulted in spine surgery. Two years after his discharge, a program was put into place to allow Service members with a drug addiction to stay in the military.

In support of his request, the applicant provides his medical records to include the records for the time he spent at the Alcohol and Drug Addiction Treatment Center, a character reference letter, awards and photographs, 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 basic (E-1).

On 5 My 76, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFM 39-12, *Separation for Unsuitability, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program*, paragraph 2-15a for frequent involvement with military authorities. The specific reasons for the action were:

- a. On 29 May 75, a Letter of Reprimand (LOR) was issued for failure to go.
- b. On 12 Jun 75, TAC Form 98, *Record of Individual Counseling*, indicates the applicant was counseled for failure to go.
- c. On 4 Sep 75, a Letter of Counseling (LOC) was issued for tardiness.

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- d. On 5 Oct 75, a LOC was issued for tardiness.
- e. On 8 Oct 75, a Memorandum for Record (MFR) indicates the applicant did not report to his duty location.
- f. On 5 Nov 75, a Third Delinquent Account Notice indicates the applicant's account at the Noncommissioned Officer's Club was delinquent and his charge privileges were suspended.
- g. On 11 Nov 75, AAFES Form 7200-30, *Dishonored Check Notification*, indicates the applicant issued a check with insufficient funds.
- h. On 26 Nov 75, a LOR was issued for an unauthorized test reschedule and failing to return to duty.
- i. On 26 Nov 75, a MFR indicates the applicant issued several checks with insufficient funds and failed to return a firearm to a fellow airman; lying about the weapon and then later claiming it was stolen. Because of these infractions, on 2 Dec 75, he was placed on a control roster.
- j. On 3 Dec 75, a MFR indicates the applicant issue several checks with insufficient funds and failed to pay back a fellow airman that lent him money.
- k. On 16 Dec 75, AF Form 3070, *Notification of Intent to Impose Nonjudicial Punishment*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for failure to go. He received a reduction in grade to airman basic (E-1) and forfeiture of pay of \$50.00 for two months, both suspended until 31 Mar 76, and 14 days of extra duty.
- l. On 22 Dec 75, a MFR indicates the applicant failed to return to his place of duty when told.
- m. On 31 Dec 75, a Vacation of Suspension Letter indicates the applicant violated Article 86 by failing to go on several occasions. The applicant was reduced to the grade of airman basic and forfeited \$50.00 of his pay for two months.
- n. On 5 Jan 76, AF Form 3070, indicates the applicant received NJP, Article 15 for failure to go. He received 45 days of base restriction and 14 days of extra duty.
- o. On 2 Feb 76, AF Form 3070, indicates the applicant received NJP, Article 15 for theft of property and making a false statement. He received 60 days of base restriction and 45 days of extra duty.
- p. On 25 Feb 76, a MFR indicates the applicant failed to attend a scheduled legal appointment.

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q. On 12 Mar 76, a MFR indicates the applicant failed to show for his urinalysis test due to his participation in phase IV of the drug rehabilitation program.

r. On 15 Mar 76, a MFR indicates the applicant was counseled for failing to pay his debt, failing to perform extra duty satisfactorily, and failing to show for his urinalysis test.

s. On 22 Mar 76, a LOR was issued for leaving the base while on base restriction.

t. On 25 Mar 76, a letter from the Base Drug Abuse Testing Monitor indicates the applicant had not been reporting for his urinalysis test as required each Monday, Wednesday, and Friday.

On 5 Jan 76, AF Form 2098, *Duty Status Change*, indicates the applicant was arrested by civilian authorities and charged with one count of house breaking and grand larceny.

On 23 Jan 75, AF Form 2098, indicates the applicant was released from the County Correctional Institute on bond.

On 17 May 76, AF Form 2098, indicates the applicant was tried and found guilty of house breaking and grand larceny. He was sentenced to six years in prison.

On 16 Jul 76, the applicant was notified of his administrative discharge board hearing scheduled for 21 Jul 76 which was rescheduled for 9 Aug 76.

On 9 Aug 76, the Record of Board Proceedings indicates the applicant was found to be frequently involved with civilian and military authorities in matters of a discreditable nature with a recommendation he be discharged because of unfitness with no recommendation of probation and rehabilitation.

On 23 and 31 Aug 76, the Staff Judge Advocates found the discharge action legally sufficient.

On 25 Aug 76, the discharge authority directed the applicant be discharged for frequent involvement with military authorities, with an undesirable service characterization. Probation and rehabilitation was not offered.

On 10 Sep 76, AF Form 2098, indicates the applicant was discharged under the provisions of AFM 39-12, serving a six year sentence for housebreaking and larceny.

On 10 Sep 76, the applicant received a UOTHC discharge. His narrative reason for separation is SPD-GKB which denotes "Misconduct (Civilian Conviction)" and he was credited with 1 year, 1 month, and 20 days of total active service.

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

**POST-SERVICE INFORMATION**

On 6 Oct 21, 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 14 Dec 21 and provided an FBI report. According to the report, the applicant was arrested on 1 Jun 77 for fraudulent check usage; on 28 Sep 90 for impersonating a DEA agent; on 19 Aug 93 for a probation violation; and on 16 May 01 and 28 Jun 01 for aggravated vehicular homicide while under the influence of alcohol/drugs, forgery, and failure to appear in court.

The applicant also provided a personal statement, photographs, character statements, college transcripts, his company's capability statement, and evidence of community service. In his personal statement, he states he incurred an injury to his back while lifting a "drag rack" across a six foot fence surrounding the baseball diamond. He was sent to medical care and was prescribed Darvon, was given time off to heal, and used Darvon for several months. A second incident occurred when he met a fellow service member who had served in Vietnam and was also stationed in Thailand. He became intrigued with his stories and they started hanging out at the Noncommissioned Officers (NCO) Club on Fridays and would drink and smoke marijuana together. This service member had an abundance of drugs to include heroin that they used together thinking this behavior was almost normal. He acknowledges his criminal history; most of his activities were property type crimes of using bad checks to obtain goods and or cash for drugs and there were no violent crimes or crimes against humanity. He has learned his lesson and was able to live a much better life. Over the past 20 years, he has built a business that provides jobs to Veterans and assists the community at large. Resources were not available to him in 1975; his severe drug use was considered a sickness. He was fearful to speak to someone about his problems at the time for fear of punishment.

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.

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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 (USD P&R) issued supplemental guidance 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 the paragraphs 6 and 7 of the Wilkie memorandum.

On 14 Jun 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

**Honorable.** The quality of the airman's service generally has met 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.

**Under Honorable Conditions (General).** 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 airman's military record.

**Under Other than Honorable Conditions.** 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

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conduct expected of airmen. 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 Air Force.
- 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 assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

**AIR FORCE EVALUATION**

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant clearly had substance abuse issues during service; however, his evaluation from the Alcohol and Drug Addiction Treatment Center showed that he sold drugs first because of greed and money and then he used drugs shortly afterwards that led to his addiction to heroin and repeated misconduct issues to support his drug use or as a result of his drug use. He was not found to have any mental health concerns such as depression or anxiety or other emotional issues that may cause him to sell and use drugs per the evaluation and psychological test results from the Alcohol and Drug Addiction Treatment Center. Furthermore, he was reported to have less anxiety than he would normally experience but nevertheless, his anxiety level was found to be within normal limits. It appeared from evaluations by his mental health providers at the Alcohol and Drug Addiction Treatment Center his problems were primarily drug abuse and addiction. His administrative board hearing reported he was depressed because of his menial tasks and job dissatisfaction causing him to use drugs. His numerous misconduct infractions to include failure to report, writing bad checks, and housebreaking and grand larceny were reported to have been caused by his drug use and/or to support his drug habit. His initial drug use may have been in response to him feeling depressed derived from his job dissatisfaction, but his subsequent and continued drug use was caused by his addiction to drugs and not because he was using drugs to cope with his depression according to the objective records. There was no evidence his depression was severe or persistent necessitating him to receive mental health treatment or caused significant impairment to his overall functioning. Thus, there was no compelling nexus between his drug use and mental health issues/emotional distress. The applicant had engaged in numerous misconducts, minor and serious offenses, during his brief time in service, and he was convicted of grand larceny by a civilian court and admitted to selling drugs under oath. His more serious offenses were illegal and egregious and more likely than not, premeditated, and could not be excused or disregarded by his mental health condition or substance abuse issues.

The applicant contends he had hurt his back during service causing him to become addicted to pain killers. There was no evidence to support this contention. He was examined by several providers,

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medical and mental health, and there was no evidence he had any back injuries during service or had become addicted to pain killers because of his back injury. He was reported to be in excellent health by his medical provider at the Alcohol and Drug Addiction Treatment Center and during his separation physical, he marked “No” in response to “Recurrent back pain.” As outlined previously, his substance use was in response to his job dissatisfaction and not because of his back pain as alleged. He also contended he was introduced to drugs by a fellow service member and thought it was the norm. While it was plausible this situation may have occurred, the applicant was described during his administrative board hearing and his evaluation by the Alcohol and Drug Addiction Treatment Center to be an intelligent individual and he knew what he was doing. He continued to use drugs despite the ramifications to his military career and health. His drug addiction led to the decompensation of his overall functioning and he was provided with drug rehabilitation treatment when he was sentenced to jail by civil conviction. His substance abuse issues were his primary condition influencing his behaviors and causing his misconduct and while they are technically a mental health condition, his substance abuse is an unsuiting condition for military service. The Psychological Advisor opines the severity and frequency of his misconduct and his repeated undesirable behaviors in a short period of time could not be outweighed by his mental health condition/substance abuse problems and therefore, finds no error or injustice with his discharge from a mental health perspective.

Liberal consideration is applied to the applicant’s request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

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

The applicant contends he sustained a back injury, was prescribed pain killers, and became addicted to pain killers. He alleges he was also introduced to drugs by a fellow service member and thought it was the norm. He reported most of his misconduct was caused by his drug abuse/addiction causing his discharge.

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

There is evidence from the applicant’s administrative board hearing conducted during service he had developed an addiction to heroin that caused most of his misconduct to include being financially irresponsible and committing housebreaking and grand larceny due to his drug use. The cause of his drug use was initially attributed to depression derived from his menial tasks and job dissatisfaction. His evaluation from an Alcohol and Drug Addiction Treatment Center for drug rehabilitation treatment also during service reported he began to sell heroin due to greed and money and then began using afterwards resulting with his addiction to drugs. There was no mental health concerns or emotional distress that caused his drug use. There was no evidence he had sustained a back injury that led him to become addicted to pain killers during service as he had contended.

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

The applicant’s drug use may have been initially caused by his depression in relation to his menial tasks and job dissatisfaction; however, his continued drug use, numerous misconduct, and undesirable behaviors were caused by his addiction to drugs and not because he was using drugs to cope with his depression. He was reported to have sold drugs/heroin because of greed and

money and most of his misconduct to include his conviction for grand larceny was caused by his drug use or to support his drug habit and not because of his depression. His drug use was the primary condition causing his problematic behaviors and while this condition was unsuited for service and may have caused his misconduct, his mental health condition/substance abuse problem does not excuse or mitigate his undesirable 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. His misconduct and discharge especially for grand larceny and selling drugs were found to be premeditated and too serious and egregious that could not be disregarded or outweighed by his mental health condition.

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 13 Oct 22 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 clemency requests are technically untimely. However, it would be illogical to deny a clemency application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by 10 U.S.C. § 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The discharge was not unduly harsh or disproportionate to the offenses committed. Therefore, the Board concurs with the rationale of the AFBCMR Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, the Board found no evidence his mental health condition had a direct impact on his behaviors and misconduct resulting with his discharge. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. While the applicant has presented some supporting documentation indicating he has apparently made a successful post-service transition, the Board does not find the evidence sufficient to conclude they should upgrade the applicant's discharge at this time. In addition, the applicant has provided an FBI report indicating he has had some criminal activity since his discharge. Therefore, the Board recommends against correcting the applicant's records.



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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2021-01550 in Executive Session on 21 Dec 22:


 <i>Work-Product</i>	Panel Chair
 <i>Work-Product</i>	Panel Member
 <i>Work-Product</i>	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 Dec 19.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Non-Viable Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 6 Oct 21.
- Exhibit D: Applicant's Response, w/atchs, dated 14 Dec 21.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 14 Jun 22.
- Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Oct 22.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Oct 22.

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.

10/20/2023

 <i>Work-Product</i>	_____
Board Operations Manager, AFBCMR	
Signed by: USAF	