



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02550

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. The Board provide relief from his court-martial sentence by granting him a discharge upgrade to honorable.
2. His separation code, narrative reason for separation, and his reentry (RE) code be changed to "Secretarial Authority."

APPLICANT'S CONTENTIONS

He is requesting an upgrade to his discharge so he can obtain benefits to help with his medical injuries he sustained while on active duty. He was involved in a vehicle accident while on active duty which left him with injuries to his neck and spinal areas. The medical attention he received did not alleviate the pain and he attempted to alleviate the pain through illegal drug use. The pain to his head, neck, and back progressively worsened over time and he was told the pain would only be alleviated through surgery. He does not currently have medical insurance needed to help with the cost of the surgery. He has been a law bidding citizen with no illegal use of drugs or prescription medications. He acknowledges his mistake and takes fully responsibility. He had a stellar career of more than eight years without incident but feels he has been punished enough.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 22 Jun 88, the convening authority published General Court-Martial Order *Work-Product* The Order stated the applicant pled guilty to one charge, one specification of wrongful use of cocaine (Article 112a). The applicant was sentenced to confinement for seven months, forfeiture of pay of \$200.00 per month for seven months, reduction to the grade of airman basic, and discharge from the service with a bad conduct discharge (BCD).

On 9 Nov 88, SF 93, *Report of Medical History*, indicates the applicant reported he suffered from a neck injury due to a motor vehicle accident in Sep 87.

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Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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On 20 Mar 89, the convening authority published General Court-Martial Order [REDACTED] The Order stated the applicant's sentence has been affirmed and his BCD will be executed.

On 29 Mar 89, the applicant received a BCD. His narrative reason for separation is "General Court-Martial Order Number 41" and he was credited with 8 years, 5 months, and 15 days of total active service.

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

POST-SERVICE INFORMATION

On 8 Dec 21, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI), which the applicant provided on 3 Feb 22 (Exhibit D). According to the report, the applicant has had no arrests since discharge. Although the applicant did provide a FBI Identity History Summary Check, his response did not include any evidence of his post-service activities.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.

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 paragraphs 6 and 7 of the Wilkie Memorandum.

On 8 Dec 21, the Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

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

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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 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

AF/JA recommends denying the applicant's request for an upgrade to his BCD imposed at court-martial finding insufficient evidence or allegation of error or injustice. The applicant is currently separated from the Air Force, presumably with a BCD. There are no accompanying personnel files or court-martial files, so AF/JA was unable to determine the underlying facts of the misconduct, the procedural history, the punishment, or even whether he was tried by a general or special court-martial. They have only ascertained that the underlying misconduct was drug use in violation of UCMJ Article 112a. Due to the lack of facts, they could not conduct an appropriate legal analysis. However, based on the applicant's own admission of "self-medicating," and furthermore under the principle of presumption of regularity, they saw no error or injustice. It should be noted that if the applicant is making his request on the grounds of clemency rather than error or injustice, then that is beyond the scope of their review.

The complete advisory opinion is at Exhibit E.

The applicant's military records were obtained and an additional advisory was provided. AF/JA recommends denying the applicant's request for an upgrade to his BCD based on clemency. His records show that on 13 May 88, pursuant to his guilty plea, the applicant was found guilty at general court-martial of wrongfully using cocaine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ). The court sentenced him to a BCD, confinement for seven

months, forfeitures, and reduction in grade to E-1. He was discharged on 29 Mar 89. AF/JA finds no clemency grounds to upgrade the applicant's BCD. It should be noted that according to 10 U.S.C. Section 1552, the AFBCMR does not have the authority to change a court-martial sentence based on error or injustice since it is the appellate courts that review court-martial sentences. The only grounds available to the Board in this instance is clemency. Clemency is the act of changing a commander's or a court's punishment despite there being no error or injustice, and hence it is an extraordinary form of relief. Here, there is no evidence that the applicant's contributions to society have been so extraordinary in the 32 years since discharge to warrant his requested discharge upgrade.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 4 Oct 22 for comment (Exhibit G), and the applicant replied on 13 Oct 22. In his response, the applicant's counsel contends he was unjustly and unfairly punished for a one-time use of cocaine. He served honorably until his court-martial. He was severely injured while on active duty which has led to lasting physical impairments since the incident. He has served his community selflessly for three decades since his convection. As evidence, the applicant submits two articles relating to the racial disparity in drug convictions which notes a report from the Brennan Center finding that Black people are being disproportionately arrested, convicted, and imprisoned for possession and distribution of crack cocaine. Additionally, the applicant submits a personal statement, the National Institute of Military Justice Report for DoD Racial Disparities, and the Report of Inquiry for Racial Disparity from the Inspector General Department of the Air Force noting that black service members were more likely to face courts-martial than white service members.

The applicant's complete response is at Exhibit H.

FINDINGS AND CONCLUSION

1. The application is timely. 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 limitations 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 injustice. The Board concurs with the rationale and recommendation of AF/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions finding no evidence that the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. Additionally, the Board found no nexus between the applicant's accident which resulted in neck and back injuries and his illegal use of cocaine. The Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offense(s) committed, and the applicant's post-service conduct. The Board contemplated the many principles

included in the Wilke Memo to determine whether to grant relief based clemency. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. While the applicant has provided a personal statement and a FBI report showing no arrests since his discharge, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. Furthermore, the Board acknowledges the applicant's contention that he was discriminated against and that inequality and systemic racism was the root of his discharge; however, other than his own assertions, we do not find the evidence presented sufficient to support this claim. Therefore, the Board recommends against correcting the applicant's records.

The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on clemency.

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 2.1, considered Docket Number BC-2021-02550 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 21 Jun 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 8 Dec 21.
- Exhibit D: FBI Report, dated, 3 Feb 22.

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- Exhibit E: Advisory opinion, AF/JA, dated 25 Feb 22.
- Exhibit F: Advisory opinion, AF/JA, dated 3 Oct 22.
- Exhibit G: Notification of advisory, SAF/MRBC to applicant, dated 4 Oct 22.
- Exhibit H: Applicant's response, atchs, 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.

12/4/2023

Work-Product

Board Operations Manager, AFBCMR

Signed by: *Work-Product*