



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02563

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His grade be restored to staff sergeant (E-5).
3. He be retired at the grade of chief master sergeant (E-9).
4. He receive all back pay and benefits to include family access to Department of Veterans Affairs (DVA) healthcare to the day of his discharge.
5. He receive an apology for being subjected to a system aimed at hurting others with differing opinions on USAF policies and procedures to include reprisal.
6. He receive 100 percent disability for Post-Traumatic Stress Disorder (PTSD).

APPLICANT'S CONTENTIONS

The overall decision was erroneous; a blatant disregard for justice, due process, and many other civil rights violations. He was unlawfully detained and suffered mental anguish. He was wrongfully convicted at a court-martial and subsequently, unlawfully detained in confinement. He was subjected to "slave treatment" when he was brought to Work-Product Air Force Base from confinement in handcuffs and shackles and "paraded in front of the masses on base."

He was summoned while he was on leave to report to the orderly room for a random urinalysis (UA) test. He requested to conduct the UA test the following Monday because he was on official government leave conducting a fundraiser at the time but the captain insisted he go in that afternoon as retaliation based on a previous incident that was overturned by the AFBCMR. His UA test came back positive and he was offered an Article 15, which he declined stating the test results were wrong. The expert witness representing the Work-Product was not an employee or associated with the company, which was presenting as the testing location. The grueling ordeal of the legal process and discharge action consumed about four years of his life while on active duty. He is deserving of restoration and suffered from PTSD, migraines, sleep apnea, high blood pressure, erectile dysfunction, irregular eating, Type II Diabetes, occasional nightmares recalling

AFBCMR Docket Number BC-2021-02563

Work-Product

Work-Product

the events, weight loss, vision, and nerve/elbow issues associated with his handcuff and shackle experiences, hints of depression, etc. from his experiences/ordeal.

In a previous incident, an attempt to extort money from him was made by a local national from a so-called accident. He was cited for an accident and the local national made false claims to receive compensation. He disputed this claim; however, received no support from the base legal department and others in his chain of command/leadership. He received nonjudicial punishment (NJP) for this incident and when he returned to the United States he appealed to the AFBCMR to return his stripe and remove the Article 15 from his records, which was successful.

In support of his request the applicant provides a personal statement, his UA testing report, a request for litigation package from his Area Defense Counsel (ADC) that was ultimately denied, a correspondence from his legal counsel, and a copy of his request for clemency while in confinement

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 8 Nov 94, the AFBCMR granted the applicant's request to have his NJP imposed on 8 Sep 92, removed from his record with all rights, privileges and property restored. Additionally, the Board granted him supplemental promotion consideration to the grade of technical sergeant (E-6). The Board found sufficient relevant evidence was presented to demonstrate the existence of probable error or injustice; specifically noting the applicant provided the vice commander eye witness statements concerning the Article 15 and requested the vice commander reconsider his decision. The vice commander reviewed the new evidence and recommended the applicant's grade be reinstated and the Article 15 and any other derogatory information be removed from his records. In view of the statement from the vice commander and given the comments and recommendation of the Associate Chief, Military Justice Division, the Board granted full relief.

On 6 May 96, the convening authority published Special Court-Martial Order (SCMO) Number [REDACTED] No... The Order stated the applicant pled not guilty, but was found guilty to four charges and four specifications of wrongful use of marijuana (Article 112a), dereliction of duty, willful failure to be contacted while on leave (Article 92), disrespect towards a commissioned officer (Article 89), and disrespect towards a noncommissioned officer (Article 91). The applicant was sentenced to confinement for 6 months, forfeiture of \$100.00 pay per month for 6 months, and reduction to the grade of airman first class.

On 24 May 96, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraphs 5.52.3 and 5.54 for misconduct. The specific reasons for the action were noted in the 10 May 96 and 14 May 96 Notification Memorandums and were outlined in SCMO Number [REDACTED] No... The applicant

acknowledged receipt of the Notification Memorandums and on 14 May 96 requested a hearing before the Administrative Discharge Board.

On 29 May 96, the applicant was notified the Administrative Discharge Board Hearing was scheduled for 6 Jun 96 which noted the matter before the board was a recommendation he be discharged for the commission of serious offenses and drug abuse.

On 30 May 96, the applicant acknowledged receipt and requested all members of the board be enlisted except for the board president which he was advised by his counsel, this was the only officer needed. Additionally, the applicant submitted a written request for clemency asking for a reduction of his confinement to time served due to hardship and asked he be given the opportunity to continue his career in the Air Force. He further attested he did not illegally use drugs and the evidence against him was false and possibly fabricated and goes on to explain discussions he had with his counsel and the charges of dereliction of duty and disrespect against him. He submitted documentation in the form of awards, appreciation letters, and character reference letters to support his request. He also, through counsel, requested witnesses to support his claim his UA sample was mishandled by the laboratory and the test results were inaccurate.

Dated 4 Jun 96, Special Order Work-Product listed the board members which included the board president as an officer and the two panel members, one officer and one enlisted.

On 6 Jun 96, the majority of the members of the Administrative Discharge Board found the applicant did commit serious offenses by being disrespectful to his superiors, failing to be able to be contacted while on leave, and wrongfully using marijuana with a recommendation he be discharged with a general (under honorable conditions) service characterization and not be offered probation and rehabilitation.

On 25 Jun 96, the Assistant Staff Judge Advocate found the discharge action legally sufficient.

On 1 Jul 96, the discharge authority directed the applicant be discharged with a general service characterization, concurring with the findings of the administrative discharge board proceedings.

On 19 Jul 96, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 11 years and 18 days of total active service. It is noted the applicant had lost time for the period of 16 Feb 96 thru 11 Jul 96.

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

POST-SERVICE INFORMATION

On 1 Feb 23, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case. Although the applicant did reply to the request for post-

service information, his response did not include an FBI background check or other criminal history data. The post-service evidence the applicant provided included two character reference letters, a news article, letters of appreciation from his time in the military, and copies of his character reference letters that were presented at his discharge board hearing.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

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

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

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

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

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

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (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 1 Feb 23, 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 completed a review of all available records and finds insufficient evidence has been presented to support the applicant's request for the desired changes to his records from a mental health perspective. His mental health condition did not have a direct impact or was a mitigating factor to his misconduct and subsequent discharge from service. The applicant consistently denied he used or abused drugs/marijuana at the time of service and alluded to the same assertion in this current petition to the AFBCMR. He also denied at the time of service he was derelict in the performance of his duties and being disrespectful to the first lieutenant (1Lt) and master sergeant (MSgt). He was found guilty and convicted at special court-martial for all of these offenses and the administrative board hearing by majority opinion also made the same conclusion and opinion. His positive drug test/marijuana use, dereliction of duty, and being disrespectful to his superiors were the reasons for his discharge. Since he denied engaging in any of these behaviors or misconduct, then it is not possible his mental health condition caused any of these behaviors according to his statements. His objective military records corroborate this impression. There are no records he had any mental health condition or issues during his time in service, his separation physical examination from his Primary Care Manager (PCM) reflected his psychiatric evaluation was normal, and he made no references to having any mental health issues in his personal statements for clemency request to the administrative hearing board. He discussed in his personal testimony he received mental health evaluations and attended stress relief training at the mental health clinic on base as part of his pre-trial preparation. There are no records of these evaluations and training nor did the applicant submit records to substantiate his claims. He claimed he developed PTSD, depressive symptoms, and other mental health issues from his legal issues and discharge action process. There are no records or statements from a duly qualified mental health professional during and post-service to confirm he had these conditions or issues. Nevertheless, despite no records for verification, his emotional reaction to his legal and

occupational stressors are not uncommon. While it is possible he developed mental health issues and emotional distress from these stressors, there is no evidence he had any mental health issues prior to or during the time of any of his documented misconduct infractions, the reasons for his discharge. Again, his mental health condition was developed in response to his legal and occupational problems caused by his own misconduct and no evidence they preceded these problems.

The applicant is also requesting a medical discharge/retirement for PTSD. There is no evidence this condition had existed or occurred during his military service and as such, no evidence he had any unfitting mental health condition to include PTSD that would lead to early career termination. There are no records he was placed on a duty limiting condition profile for his mental health condition, he was never deemed not worldwide qualified due to his mental health condition, and no statements from his leadership or providers his mental health condition had impacted his ability to reasonably perform his military duties in accordance with his office, grade, rank, or rating. For awareness, the military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of law, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary [improve or worsen] over the lifetime of the veteran.

Liberal consideration is applied to the applicant's request for an upgrade to honorable based on his contention of a mental health condition. Liberal consideration is not appropriate to be applied to his requests for medical discharge/retirement, disability rating, back pay, and upgrade/restore rank because these requests are not covered or applicable under this policy. The following are responses to the four questions from the Kurta Memorandum from the available records for review:

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

The applicant contends he received mental health evaluations and stress relief training as part of his pre-trial preparation during service. He also contends he developed PTSD, hints of depression, and other mental health issues from his legal and occupational problems. He did not make a contention his mental health condition may excuse or mitigate his discharge.

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

The applicant's full service treatment records are not available for review to corroborate his contentions. There is no evidence his mental health condition of PTSD, depression, etc. had existed or occurred during his military service. He received a separation physical examination from his PCM on 14 May 96 and his psychiatric clinical evaluation was assessed to be "normal."

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

The applicant was discharged from service for wrongful use of marijuana, dereliction of duty, and being disrespectful to his supervisors which he had consistently and vehemently denied. There is no evidence his mental health condition caused his discharge and does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition does not excuse or mitigate this discharge, his condition also does not outweigh his discharge.

The complete advisory opinion is at Exhibit E.

AF/JAJI recommends denying the application finding insufficient evidence to demonstrate a material error or injustice. On 28 Jul 95, the applicant was selected for a random urinalysis at **Work-Product** Air Force Base. The urine specimen he provided tested positive for marijuana at 22 nanograms per milliliter (ng/ml) (DoD cutoff was 15 ng/ml). According to the applicant, he was offered NJP for the drug use, but he elected not to accept that forum and instead was court-martialed for four offenses.

Much of the applicant's request is beyond the scope of relief that can be granted by the AFBCMR. Additionally, the applicant's request does not involve an error in his military records, but further emphasizes his disagreement with the findings at his court-martial and by the Administrative Discharge Board. DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.4.4, states the applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice. As this is not a de novo review, AF/JAJI's scope is limited to determining whether there was an error to the detriment of the applicant. AF/JAJI finds no error and defers to the fact finder; however, deference to the fact finder is not blind deference, as findings of fact can be evaluated for arbitrariness and capriciousness. Nevertheless, in the context of correcting military records, an unusually deferential application of the "arbitrary or capricious" standard is applied as noted in *Roberts v. United States*, 408 U.S. App. D.C. 211, 217 (2014). Under this deferential standard, AF/JAJI finds the applicant's claims are no more than a disagreement with the fact-finder's decisions and further find the fact-finders were in the best position to evaluate the information available to them to support a guilty verdict and administrative discharge. Far from being arbitrary or capricious, the fact-finders' conclusions were based on evidence presented at trial and at the Administrative Discharge Board proceedings.

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 8 Sep 23 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 and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Hence, the Board finds no reason to grant the applicant's request for a grade restoration to staff sergeant nor a retirement in the grade a chief master sergeant. Additionally, the Board concurs with the rationale of the AFRBA Psychological Advisor and rationale and recommendation of AF/AJAI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The Board finds the applicant's military duties were not degraded due to his alleged mental health conditions. A Service member shall be considered unfit when the evidence establishes that the member, due to physical or mental health disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Furthermore, a higher rating by the DVA, based on new and/or current exams conducted after discharge from service, does not warrant a change in the total compensable rating awarded at the time of the member's separation.

The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The applicant did not provide any evidence or records to substantiate his claim a mental health condition in service caused his misconduct, thus his condition does not mitigate or excuse his discharge and he consistently denies he engaged in any of the misconduct to which he was discharged for. The burden of proof is placed on the applicant to submit evidence to support his claim. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the post-service information he submitted without a criminal history report, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records. The applicant retains the right to request reconsideration of this decision. The applicant may provide additional post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

4. The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC § 1034). By policy, reprisal complaints must be filed within one year of the alleged incident or discovery to facilitate the inspector general (IG) investigation. However, the applicant has not provided any evidence he filed an IG complaint alleging reprisal. Nevertheless, the Board reviewed the complete evidence of record to reach its

own independent determination of whether reprisal occurred. Based on our review, the applicant has failed to provide substantial evidence to establish he was reprised against. Therefore, in the absence of persuasive evidence to the contrary, we do not find that the applicant has been the victim of reprisal.

5. 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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2021-02563 in Executive Session on 25 Oct 23:

- Work-Product* Panel Chair
- Work-Product* Panel Member
- Work-Product* Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 5 Feb 22.
- 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 1 Feb 23.
- Exhibit D: Applicant’s Response, w/atchs, dated 2 Mar 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 5 Jun 23.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 7 Sep 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Sep 23.
- Exhibit H: Previous Case Files, BC-1994-00694, 8 Nov 94.

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.

3/12/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: *Work-Product*