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## RECORD OF PROCEEDINGS

IN THE MATTER OF:

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DOCKET NUMBER: BC-2022-01429

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to an unspecified character of service.

### APPLICANT'S CONTENTIONS

He was found guilty in court for using drugs after telling on himself to the first sergeant a month prior. The judge recommended the "return to duty" program and he was denied access. He was not offered a rehabilitation program, nor was he medically released before his discharge and believes this to be an injustice.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 21 Mar 01, the convening authority published Special Court-Martial (SPCM) Order Number [REDACTED]. The Order stated the applicant pled guilty to one charge and one specification of wrongful use of Methylenedioxymethamphetamine (Ecstasy), a Schedule I controlled substance in violation of Article 112a, of the Uniform Code of Military Justice (UCMJ). The applicant was sentenced to confinement for 4 months, forfeiture of \$809.00 pay per month for 4 months, reduction in grade from airman first class (E-3) to airman basic (E-1), and be discharged from the service with a BCD. Upon action of the same order, forfeiture of pay was changed and approved for \$695.00 pay per month for 4 months.

According to a Medical Examination for Involuntary Separation letter, dated 13 Jun 01, the applicant's medical records were reviewed, and it was determined a physical examination for separation was required and an appointment was scheduled for 13 Jun 01.

On 1 Apr 04, the applicant received a BCD with narrative reason for separation of "Court-Martial." He was credited with four years, four months, and seven days of total active service, and time lost from 13 Feb 01 through 22 May 01.

On 27 Apr 22, the applicant submitted a DD Form 149, *Application for Correction of Military Record Under the Provision of Title 10, U.S. Code, Section 1552*, requesting an upgrade to his discharge.

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On 21 Jun 22, the Board staff determined the applicant's request was not viable and closed his case because he failed to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check (IdHSC). The Board staff provided the applicant with instructions for retrieving said document (Exhibit C).

On or about 1 Sep 22, the Board received an FBI IdHSC, dated 24 Jul 22, from the applicant and re-opened his case.

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 21 Jun 22, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a FBI IdHSC, 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 or about 1 Sep 22 and provided an FBI report, dated 24 Jul 22 (Exhibit D). According to the report, the applicant was arrested on 20 Oct 06 for: Prohibited Acts – Schedule II and Prohibited Acts - Drug Paraphernalia.

## 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 (U.S.C.), 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 21 Jun 23, the Board staff provided the applicant a copy of the supplemental guidance, Wilkie memorandum (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

**Honorable.** The quality of the member's service generally has met Department of the Air Force (DAF) 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 a member's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the member's military record.

**Under Other than Honorable Conditions.** This characterization is used when basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of members. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the DAF.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual abuse of a child, sexual harassment, and attempts to commit these offenses.

## AIR FORCE EVALUATIONS

The AFBCMR Medical Advisor completed a review of all available records and recommends denying the request. The medical advisor opines the applicant, although citing a medical concern, did not have a true medical condition that would or could have been assessed to have interfered with the performance of his military duties. The objective evidence to prove a non-illicit drug use medical condition capable to be considered for Disability Evaluation System (DES) processing was severely lacking to non-existent and therefore, the advisor does not recommend a favorable granting of the vague request from the applicant. Therefore, in the absence of additional and compelling new medical record evidence to the contrary, the medical advisor finds no solid basis to recommend granting any relief sought in this application.

The complete advisory opinion is at Exhibit E.

DAF/JA recommends denying the application. First, DAF/JA finds no legal error in the court-martial findings or sentence. Second, there is no evidence to support his contention that he was "denied access to the "Return to Duty" program. Even if he was denied access, DAF/JA does not find that leads to a conclusion of an error in his SPCM findings or sentence. Third, the applicant's contention that he was "never given the opportunity for a rehab program after basically telling on myself" is insufficient evidence of an error or injustice in his SPCM findings or BCD sentence. Although it is unclear what the statement about "rehab" alleges, if the contention is that substance abuse or mental health issues should mitigate his discharge, then DAF/JA finds no evidence to support such a basis. As part of any guilty plea, a military judge conducts a providency hearing to make certain the military accused understands the crimes to which they are pleading guilty, the nature of the guilty plea, and the consequences of the guilty plea. The applicant gave the court no reason to believe he was not competent to plead guilty, including any mental health or substance abuse issues.

Furthermore, even the guidance for liberal consideration of mental health issues – the Kurta memorandum – cut against any correction. The guidance is clear the court-martial's punishment, including the BCD, was appropriately administered. According to Paragraph 19 of the Kurta memorandum: "Premeditated misconduct is not generally excused by mental health conditions

[...] Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.” Accordingly, the applicant’s acts of wrongfully using drugs on multiple occasions were premeditated misconduct, and consequently any mental health condition, even if true, neither excuses/mitigates nor outweighs the discharge.

Lastly, DAF/JA find no grounds for clemency. A clemency analysis necessarily includes a review of the applicant’s total record. Here, the FBI report reveals a drug-related criminal record post-discharge. Based on the totality of the circumstances, DAF/JA finds no basis for clemency.

The complete advisory opinion is at Exhibit F.

## **APPLICANT’S REVIEW OF AIR FORCE EVALUATIONS**

The Board sent copies of the advisory opinions to the applicant on 1 Mar 23 for comment (Exhibit G), but has received no response.

## **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 error or injustice. The Board finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. The Board also considered the passage of time, the overall quality of the applicant’s service, the seriousness of the offense committed, and the applicant’s post-service conduct. However, in the absence of evidence related to the applicant’s post-service activities and his drug conviction after his discharge which enable us to determine if his accomplishments since his discharge are sufficient to overcome the misconduct for which he was discharged, the Board finds no basis for clemency in the case. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his good citizenship since his discharge, in the consideration for an upgrade of discharge characterization due to clemency. Therefore, the Board recommends against correcting the applicant’s records.
4. The applicant has not shown that 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, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-01429 in Executive Session on 24 May 23:

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Panel Chair  
Panel Member  
Panel Member

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

- Exhibit A: Application, DD Form 149, dated 27 Apr 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request, Clarifying Guidance and Non-Viable letter), dated 21 Jun 22.
- Exhibit D: Applicant's Response, w/atch, received 1 Sep 22.
- Exhibit D: FBI Report, dated, 24 Jul 22.
- Exhibit E: Advisory Opinion, BCMR Medical Advisor, dated 23 Dec 22.
- Exhibit F: Advisory Opinion, DAF/JA, dated 27 Feb 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 1 Mar 23.

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.

12/20/2023

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Board Operations Manager, AFBCMR

Signed by:

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