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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00255

[REDACTED]

COUNSEL: [REDACTED]

HEARING REQUESTED: NO

APPLICANT’S REQUEST

1. His letter of reprimand (LOR) dated 22 Feb 21 be removed from his record.
2. His unfavorable information file (UIF) be removed from his record.
3. His referral enlisted performance report (EPR) for the period ending 30 Nov 21 be administratively corrected or removed from his record.
4. He receive supplemental promotion consideration for the rank of master sergeant (E-7) for the Calendar Year 2022 (CY22) Master Sergeant Promotion Cycle.

APPLICANT’S CONTENTIONS

On 9 Nov 20, he and his then wife disagreed about marijuana she had stored in their home. He attempted to remove the marijuana and the disagreement became physical. He was arrested and charged with second degree assault. His command ordered a urinalysis after the arrest and his urine tested positive for marijuana. On 30 Apr 21, his motion to suppress and dismiss was granted. However, he was issued a LOR on 22 Feb 21. In Sep 21, an administrative discharge board convened related to his alleged drug abuse and found he had not wrongfully used marijuana.

On 3 Dec 21, he received a referral EPR for failure to meet Air Force standards and the LOR/UIF for violation of Article 112a, illegal use of marijuana. His security clearance was suspended and he received a “Not Ready Now” promotion recommendation.

The evaluation report appeals board (ERAB) denied his request for correction or removal of his referral EPR, although the discharge board determined he did not wrongfully use marijuana and his commander recommended approval for removal of the EPR.

Counsel, on behalf of the applicant, contends the LOR and referral EPR are inaccurate and inappropriate because they rely on a confirmation test that violated Department of Defense (DOD) policy and procedures. His command relied on a urinalysis performed by his medical group (MDG) that determined he illegally used marijuana. However, DODI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program*, states the cutoff value for an initial marijuana test is 50 milliliter (ng/ml) and the cutoff value for a confirmation test is 15 ng/ml. Yet, his MDG used a cutoff value of 5 ng/ml. The deficient test was cited to determine he illegally used drugs. Further, the administrative discharge board uncovered information about witnesses, to include a

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self-proclaimed meth addict and drug dealer. His then wife was also a known drug user. It is inequitable and unjust to allow testimony only from drug users and dealers to impact his career. Under DODI 1010.16, drug use must be identified by an initial test and confirmed with a second test and cutoff limits are established for both tests. A procedurally deficient confirmation test is invalid. Thus, he could not have wrongfully used marijuana.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a technical sergeant (E-6) in the Air Force.

The Defense Health Agency Forensic Toxicology Examination Final Report dated 20 Nov 20, with incident date of 10 Nov 20 and submission date of 13 Nov 20, shows the applicant was positive for tetrahydrocannabinol (THC) with cutoff 5 ng/ml.

Counsel provides LOR dated 22 Feb 21. It states an investigation disclosed on 9 Nov 20 he was physically aggressive with his spouse. Specifically, she was attempting to grab a bag of marijuana. He grabbed her arm and dragged her across the floor of their residence while their children witnessed the incident. He was arrested by the county police. Further investigation through a positive urinalysis test disclosed he illegally used marijuana. Various witness interviews also revealed he had unlawfully used marijuana on multiple previous occasions. The LOR is not contained in the applicant's automated records management system (ARMS) record.

The military personnel data system (MilPDS) reflects the applicant does not have a UIF.

The District Court for the County Case Summary report shows the applicant was not guilty of assault second degree with disposition date 30 Apr 21 and the case was closed.

In a memorandum for record (MFR) dated 2 Sep 21, the Deputy Director for the Air Force Drug Testing Laboratory, Air Force Medical Operations Agency states a member's specimen cannot be reported positive unless it is equal to or greater than the DOD established cut-off on both tests. The DOD requires that a specimen have a concentration of THC metabolites equal to or greater than 50 ng/ml to be considered "presumptive positive." Specimens which have confirmation values that quantitate below 15 ng/ml are reported as negative.

On 9 Sep 21, the administrative discharge board found the applicant did not wrongfully use marijuana and there was not a basis for discharge under AFI 36-3208, *Administrative Discharge of Airmen*. Since it had not been shown by a preponderance of the evidence a drug offense was committed, he was recommended for retention.

The applicant received a referral EPR for the reporting period ending 30 Nov 21 for failure to meet Air Force standards, LOR/UIF for Article 112a violation for illegal use of marijuana and security clearance suspension. The applicant acknowledged the EPR on 29 Dec 21.

The applicant requested the ERAB remove or substitute his 30 Nov 21 EPR on the basis of the administrative discharge board findings and his commander recommended approval. On 10 Jun 22, the ERAB denied his request stating it was not convinced there was an error or injustice.

[REDACTED]

[REDACTED]

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

APPLICABLE AUTHORITY

DODI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program*, Table 3. Confirmatory Test Cutoff Concentrations, Initial Presumptive Positive Test for Cannabinoids is 15 ng/ml.

DAFI 36-2603, *Air Force Board for Correction of Military Records*, paragraph 2.4., The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden of providing evidence of an error or injustice.

AIR FORCE EVALUATION

AFPC/DPMSSM recommends denial. There is evidence of an error or injustice; however, the LOR is not in the applicant's automated records management system and therefore there is no LOR to remove.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 7 Mar 23 for comment (Exhibit D). Counsel states it appears all parties agree there was an error or injustice pertaining to the referral EPR and LOR for drug abuse when the test results used as a basis were conducted in a manner that did not conform with DOD policies and procedures governing urinalysis. For the foregoing reasons, the LOR and referral EPR should be removed and he be retroactively considered for promotion to the rank of master sergeant.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

AFPC/JA recommends denial. While differing from the decision of the administrative discharge board, AF/JA finds the applicant failed to meet a preponderance of the evidence standard or that there was a fundamentally erroneous or unjust reason to necessitate relief.

Following a civilian arrest for domestic violence on 9 Nov 20, he was ordered by his commander to submit to a urinalysis. On 10 Nov 20, his MDG conducted the urinalysis utilizing a 5 ng/ml cutoff value for THC rather than the 15 ng/ml cutoff value for THC found in DODI 1010.16. Relying on the test and various witness interviews, including the applicant's wife and other drug users, the commander issued a LOR dated 22 Feb 21 and a referral EPR on 9 Sep 21. On 9 Sep 21, the applicant was retained at a discharge board for drug abuse.

The standard of proof for LORs, referral EPRs and administrative discharge boards is preponderance of the evidence per AFI 36-2907, *Adverse Actions*, DAFI 36-2406, *Officer and Enlisted Promotions Systems* and AFMAN 51-507, *Enlisted Discharge Boards and Boards for Officers*. Preponderance of the evidence is defined as when it is more likely than not that events occurred as alleged and when it is more likely than not that a fact exists.

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The applicant's request for relief rests primarily on the notion that the adverse actions are faulty because they largely rely on a THC cutoff level of 5 ng/ml rather than 15 ng/ml. However, the standard of proof is preponderance of the evidence rather than a requirement that evidence take a particular form. Consequently, a commander could lawfully rely solely on eyewitness testimony and no urinalysis report in a drug abuse case provided the evidence met the standard of proof. Here, the commander was within his discretionary authority to weigh the evidence of the 5 ng/ml urinalysis results and eyewitness reports in favor of the conclusion he more likely than not wrongfully used drugs. LORs are intended to improve, correct and instruct subordinates who depart from standards of performance and conduct. In this case, the commander used the corrective tool to address allegations of drug abuse and physical aggression towards his spouse. The fact the applicant disagreed with the commander's factual findings does not provide a basis for relief.

There is no applicable law, guidance, policy or statute requiring the commander to substitute the decision of the discharge board for his own. It was within his authority per AFI 36-3208 to have recommended discharge. The commander's decision to maintain the LOR, UIF and referral EPR are legally sufficient.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 12 Apr 23 for comment (Exhibit G). Counsel contends it is telling the Air Force has provided essentially two advisory opinions that contradict each other. The second advisory conceded the Air Force test failed to meet the bare minimum standards set by DOD. However, it attempts to hand-waive this defect away by taking an absurd position that a commander can rely on absolutely no scientifically valid results and just take the word of drug users with a bias against the applicant in order to take an administrative action that effectively ends his career. This specious line of argument raises the unavoidable question whether a commander can rely on tarot cards and tea leaves as a basis for taking adverse actions. The advisory opinion author would say "Yes."

The advisory opinion does not wrestle with the actual contentions by the applicant that regardless of whether it was permissible for a commander to credit the word of biased, drug addicted witnesses and uncertified laboratory results that does not meet the bare minimum standards set by DOD over the applicant with exemplary service. His commander made a hasty decision with inaccurate and imperfect evidence. The administrative discharge board had the benefit of hearing live witness testimony and were in a better position to root out the truth of the matter. Their findings should be entitled to significantly more weight than the commander's decisions.

The applicant's complete responses is at Exhibit H.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

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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 and recommendation of AFPC/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant's records do not include a LOR dated 22 Feb 21 and he does not currently have a UIF. Accordingly, there are no actions for the Board with respect to the request for removal of the LOR and UIF from the applicant's records. The applicant contends his referral EPR ending 30 Nov 21 should be removed from his record and he receive supplemental promotion consideration for the rank of master sergeant based on the discharge review board's conclusion he did not use marijuana wrongfully and his urinalysis did not meet the threshold for a positive test per DODI 1010.16. However, the Board finds the applicant has not sustained his burden of proof his referral EPR is not accurate as reflected. Moreover, while he was found not guilty of second degree assault, the applicant acknowledges his disagreement with his then wife over marijuana in their home became physical and he was arrested for domestic violence. The applicant contends his commander made a hasty decision in issuing the referral EPR and the discharge review board had the benefit of considering all of the evidence. However, the Board notes the discharge review board convened on 9 Sep 21 and the applicant's referral EPR did not close out until 30 Nov 21 and was not finalized until 29 Dec 21. In this respect, the Board finds the applicant's commander considered the totality of the evidence and found the applicant wrongfully used marijuana. Consequently, the Board agrees with the ERAB the applicant has not sustained his burden of proof. Since the Board finds insufficient evidence to warrant removal of the referral EPR, the Board finds no reason to recommend the applicant be considered for supplemental promotion consideration to the rank of master sergeant. Therefore, the Board recommends against correcting the applicant's records.

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 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-2023-00255 in Executive Session on 30 May 23:

- [REDACTED] Panel Chair
- [REDACTED] Panel Member
- [REDACTED], Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 22 Dec 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSMP, dated 2 Mar 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 23.
- Exhibit E: Applicant's Response, w/atchs, undated.
- Exhibit F: Advisory Opinion, AFPC/JA, dated 5 Apr 23.
- Exhibit G: Applicant's response, undated.



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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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AFBCMR Docket Number BC-2023-00255

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