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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00426

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to change:
a. Block 24. *Character of Service*, from General-Under Honorable Conditions to Honorable.

b. Block 26. *Separation Code*, from JKK to a code appropriate to the upgraded discharge.

c. Block 27. *Reenlistment Code*, from 2B to 1.

d. Block 28. *Narrative Reason for Separation*, from Misconduct-Drug Abuse to Secretarial Authority.

APPLICANT'S CONTENTIONS

Counsel provided a detailed summary of the legal standards presented in support of the applicant's contentions as well as Department of Defense guidance relating to liberal consideration and clemency.

The applicant enlisted in the Air Force as a linguist. Upon learning he could live off-base, without a curfew, and make more money if he was married, he married his girlfriend. His grade point average was below what was needed to continue as a linguist, so the Air Force offered him another job of his choice. He chose to be a carpenter and was sent for training prior to being moved to Texas where he was assigned to a self-help team. The job was enjoyable, and he had a great deal of self-management during this time.

The applicant's wife smoked marijuana and cigarettes when they first married. He asked her to stop smoking cigarettes and she increased her pot smoking. Although he did not smoke himself, the applicant was around pot often. His wife was purchasing her pot from a staff sergeant who worked with the applicant.

The applicant was drug tested along with six other people and tested positive for THC [tetrahydrocannabinol]. He asked to be re-tested, or given a blood test, to show he was not smoking himself, but his request was denied. He was given a choice to disclose where the pot was purchased or be discharged with a general (under honorable conditions) discharge. He chose to be discharged.

At age 20, the applicant wrote to the [Air Force Discharge Review] board. His letter was not contrite, but rather stated the Air Force was in error for discharging him. His upgrade was denied. He divorced his wife and gained full custody of his children. His wife did not come into their children's lives again until they were adults. He felt strongly about her smoking and getting high

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when they had young children, and this issue was the main reason for their divorce. The applicant did see a counselor for a while. He experienced anxiety over abandonment issues he had from childhood. His father's job caused the family to move every three years, and he struggled with making friends in the frequency of the moves.

Since his discharge, the applicant has worked mainly with vehicles. He owned a small car wash for a time with his father. When finances were tough, he went to work for his former landlord. He had a good reputation for keeping his word and acting ethically, and these character qualities helped him advance into management. He took a job with an auto parts dealer and became a corporate manager, and he owned an accessory store in a mall for a time. He eventually worked for a large car dealership and the experience he gained served him in his current career as a private consultant. He advises dealerships on fixed operations and travels a good deal. The applicant also served as an elected official for a town where he resided, serving three years in this capacity.

There is a procedural defect in this case. There was a hasty command-initiated request for separation. The applicant was under investigation for a pattern of misconduct; however, the command did not wait for the results of the investigation. According to Air Force instructions, under a command-initiated discharge request, consideration should be given to a service member's potential for rehabilitation, and their entire record should be reviewed before taking action. The commander must provide the service member reasonable time to overcome deficiencies. In this case, there was a rush to judgment that there was problem that could not be fixed. The commander should have evaluated the applicant as to whether he had a long-term problem, or whether there was an immediate fix.

Although the commander was authorized to administratively separate the applicant, the fundamental reason for the discharge was substantially deficient. There was no fully determined reason to initiate his elimination. The instruction also allows the service member to fix the problem, but he was not allowed these opportunities. The applicant was never offered or provided with rehabilitation and the results of his investigation were never reviewed prior to his discharge. The commander in this case did not have the proper authority to administratively separate the applicant.

Finally, the events that took place are no longer relevant to the applicant's life and he has lived since in a responsible manner. There is no valid equitable purpose in leaving the discharge in place.

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 Nov 85, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment (NJP) for: [the applicant] did, at or near Fort Worth, Texas, from on or about 18 Sep 85 until 25 Sep 85, wrongfully use marijuana. The applicant was reduced to the grade of airman basic (E-1) with a new date of rank of 22 Nov 85.

On 25 Nov 85, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Regulation 39-10, *Administrative Separation of Airmen*, Chapter 5, Section H, paragraph 5-49c. The specific reasons for the action were:

- a. Use of marijuana as evidenced by positive urinalysis results on 25 Sep 85 for which [the applicant] received an Article 15.
- b. The urine sample taken on 25 Sep 85 from [the applicant] was conducted as a result of lawful inspection under the military rule of evidence NR 313.

On 3 Dec 85, the Staff Judge Advocate found the discharge action legally sufficient.

On 13 Dec 85, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct – Drug Abuse", Separation Code is JKK [Misconduct – Drug Abuse], Reenlistment Code is 2B [Separated with general discharge] and he was credited with 2 years, 3 months, and 29 days of total active service.

On 26 Jul 86, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 1 Jul 87, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 2 Jan 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied.

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 issued supplemental guidance, known as the Wilkie Memo, 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 Memo.

On 2 Jan 24, 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.

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 EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for the desired changes to his records based on his mental health condition.

This advisory is limited to the applicant's mental health condition. Contentions regarding procedural or legal issues should be addressed by subject matter experts in these respective fields. A review of the available records finds no evidence or records to corroborate any of the applicant's legal counsel's contentions regarding his mental health condition and drug use. There is no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his marijuana usage and subsequent discharge for this act of misconduct. The applicant had consistently denied using marijuana during service, to the AFDRB, and in this current petition. His legal counsel claimed it was his wife who had smoked marijuana and said he was around marijuana often. The applicant never mentioned his wife's marijuana usage in his statement to his commander during service or to the AFDRB. Regardless of whether his wife used marijuana, it was he who had tested positive for marijuana and this was the reason for his discharge. Since he repeatedly denied using marijuana, it is not possible his mental health condition caused his documented drug use because he never used it. His legal counsel discussed he received counseling for some time for abandonment issues, frequent moves, and difficulties making friends during his childhood. These problems were his prior-service conditions and issues, and there is no evidence his military service aggravated these issues. His legal counsel also referenced liberal consideration for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) to be applied to his petition for an upgrade of his discharge. His legal counsel did not discuss how he developed PTSD or TBI during his military service, and no records were submitted to substantiate he was ever diagnosed with any of these conditions during or after service. There is no evidence or records he had, sustained, or was diagnosed with any of these conditions during service, and certainly no evidence or records that these conditions caused him to use marijuana. There is no evidence he was in emotional distress at the time of his drug use or that he used drugs to cope with his mental health condition during service. There is also no evidence he had any other mental health conditions such as anxiety, depression, insomnia, mania, psychosis, etc. that could cause him to use marijuana. He was evaluated at the Mental Health Clinic (MHC) by a duly qualified mental health provider at the time of service following his positive urinalysis and no assessments or observations were made that he had a mental health condition. He was not given any mental disorder diagnosis such as anxiety, depression, PTSD, etc. but "Drug User" was annotated in the notes from his positive urinalysis. There are no records to confirm he received any regular counseling or mental health treatment during service. He was referred to the local rehabilitation program for his drug use and records for program treatment were unavailable for review. There are no records confirming whether he actually attended the local rehabilitation program or whether he completed the program. Drug use is an unsuitable condition for military service. He also denied having any mental health conditions or concerns during his separation physical examination with his Primary Care Manager (PCM). Neither the applicant nor his legal counsel had discussed or demonstrated how his mental health condition may excuse or mitigate his discharge. Based on the extensive review of the available records, there is no error or injustice identified with the applicant's discharge from a mental health perspective.

Liberal consideration is applied to the applicant's petition. It is reminded that liberal consideration does not mandate an upgrade per policy guidance. The following are answers 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, through his legal counsel, contended his discharge was unfair and inequitable. His legal counsel stated it was the applicant's wife who had smoked marijuana, and the applicant did

not but was around marijuana often. His legal counsel stated he received counseling for some time for abandonment issues, frequent relocation, and difficulties making friends when he was a child. The Hagel Memorandum was referenced for PTSD and TBI; however, neither the applicant nor his legal counsel discussed how these conditions were developed from his military duties and service and/or how these conditions may excuse or mitigate his discharge.

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

There is no evidence or records the applicant had any mental health conditions, including PTSD or TBI, during service. The applicant was evaluated at the MHC by a military mental health provider during service following his positive urinalysis, and there were no reports or assessments he had a mental health condition. He was not given any mental disorder diagnosis such as anxiety, depression, PTSD, etc., and "Drug User" was annotated in the notes from his positive urinalysis. Drug use is an unsuitable condition for military service. He also denied having any mental health conditions or concerns during his separation physical examination with his PCM. His counseling for his abandonment issues, frequent relocations, and difficulties making friends due to his frequent moves appeared to have occurred prior to his military service. There are no records to confirm he received any regular counseling or mental health treatment during service. He was referred to the local rehabilitation program for his drug use and these records were unavailable for review. There are no records confirming whether he attended or completed the program.

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

Since the applicant consistently denied using marijuana during and after service, it is not possible his mental health condition had caused his marijuana usage leading to his subsequent discharge from service. There is no evidence or records he was in emotional distress or had a mental health condition impairing his judgment causing him to use marijuana during service. The applicant was reported to have received counseling services prior to his military service for childhood issues and stressors, and there is no evidence or records his military service had aggravated his prior service conditions or issues. From the collective information, his mental health condition, including PTSD or TBI, does not actually excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit D.

AF/JAJI recommends denying the application. There is insufficient evidence to demonstrate a material error or injustice.

On 25 Sep 85, a urine sample was collected from the applicant pursuant to a lawful inspection. On 14 Nov 85, the applicant's urine sample was reported as positive for marijuana. On 18 Nov 85, the applicant was offered, and subsequently accepted, NJP, pursuant to Article 15, Uniform Code of Military Justice, for wrongful use of marijuana between 18 Sep 85 and 25 Sep 85. He was afforded an opportunity to consult defense counsel and provided a written response, denying he used marijuana. On 22 Nov 85, his commander found him guilty, and his punishment consisted of reduction in grade to airman basic/E-1 (from airman first class/E-3). The applicant elected not to appeal. Other disciplinary action in the applicant's record includes a Letter of Reprimand (LOR), dated 20 Mar 85, for failure to go, and a Record of Individual Counseling (RIC), dated 12 Jun 85, for failure to maintain a government vehicle. These incidents both occurred in the same enlistment as the NJP.

On 26 Jul 86, the applicant applied to the AFDRB for an upgrade of his discharge service characterization to honorable. On 20 Jul 87¹, the AFDRB denied his application, finding his discharge was consistent with procedural and substantive requirements of the applicable regulation, was within the discretion of the discharge authority, and all due process rights were afforded.

On 19 Oct 23², the applicant made an application to the Air Force Board for Correction of Military Record (AFBCMR). He states in his supporting legal brief although he did not use marijuana, he was around it often as his former wife regularly smoked marijuana. He states he saw a counselor for a while because of anxiety over abandonment issues. He also discusses the various jobs he has held since his discharge including corporate manager, business owner, consultant, and elected official. On 16 Jan 24, a psychological advisor, Secretary of the Air Force/Air Force Review Boards Agency (SAF/AFRBA), provided an advisory finding insufficient evidence had been presented to support the applicant's request for a discharge upgrade from a mental health perspective.

The applicant argues in his legal brief, the decision to discharge him was "hasty" and there was "no fully determined reason," he was not offered an opportunity for rehabilitation, and leaving the discharge in place serves no purpose. He appears to be invoking the guidance concerning equity, injustice, or clemency determinations in the Wilkie Memorandum as he requests a review in the interests of "equity, fairness, and justice." The Wilkie Memorandum authorizes the AFBCMR "to grant relief in order to ensure fundamental fairness" and lays out factors for consideration. For the following reasons, we find no material error or injustice in the applicant's records warranting correction or an upgrade in service characterization on the grounds of "equity, fairness, and justice" or otherwise.

Concerning the decision to discharge him, we defer to the commander exercising discretion in this matter and find no evidence his decision was "hasty", without a "fully determined reason", or absent consideration for rehabilitation. DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.4.4, provides "[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice." The applicant has offered no evidence outside of his claims of an error or injustice, or that his commander's decisions were arbitrary and capricious, or an abuse of authority. *Roberts v. United States*, 408 U.S. App. D.C. 211, 217 (2014). The applicant had a positive urinalysis for marijuana and NJP for wrongful use of marijuana, and the regulation in effect at the time authorized initiation of discharge for drug abuse. His commander took prompt action as required, based upon information indicating the applicant was subject to discharge for drug abuse, given the potential risks to the military mission. A review of his NJP and administrative discharge records demonstrates all procedural and substantive requirements were complied with, he was afforded due process, and his rights were preserved. The record also reflects probation and rehabilitation were weighed but given the applicant's disciplinary history in the same enlistment (LOR, RIC), it was determined he had no potential for rehabilitation.

Regarding the applicant's argument that leaving the discharge in place no longer serves a purpose, we disagree, specifically because of the service characterization. In accordance with DAFI 36-3211, an honorable service characterization is reserved for those discharges where "The quality of the member's service generally has met DAF standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would

¹ The AFDRB was convened on 1 Jul 87 and the applicant was notified by letter, dated 20 Jul 87, that his application was denied.

² The applicant's DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, was dated 15 Oct 22.

be inappropriate.” The initiating commander and the separation authority in the applicant’s case were in the best position to make this determination and apparently found a general service characterization was appropriate. We defer to their judgment and authority and find no injustice or unfairness warranting an upgrade to honorable.

In addition to the above assertions, the applicant appears to introduce new information in his application to the AFBCMR, which he did not supply in his response to his NJP or notification of discharge for his commander’s consideration. He states because his wife smoked marijuana, he was around it regularly, implying this caused his positive urinalysis. However, he provides no evidence in his application supporting this conclusion. It is not within the scope of the AFBCMR to relitigate the underlying facts and circumstances of the applicant’s separation, but rather review for material error or injustice to the detriment of the applicant.

The applicant also indicates he has mental health issues or conditions related to his request; this too is new information. However, the psychological advisor found no evidence the applicant’s purported mental health issues or conditions bear any relationship to his discharge. Further, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against his requested discharge upgrade. According to paragraph 19 of the memorandum, “...substance seeking behavior and efforts to self-medicate symptoms may warrant consideration.” The applicant has consistently denied marijuana use from the time of his NJP and discharge proceedings through the time of his AFBCMR application. As a result, there is no evidence the marijuana use was from self-medicating a mental health issue or condition. Accordingly, under the Kurta standards, any mental health condition, even if verified, does not logically mitigate or outweigh his discharge or general service characterization.

Finally, according to the applicant’s legal brief, he has been a corporate manager, a business owner, a private consultant in the car dealership industry, and even a local elected official in his town following his discharge from the Air Force. From all indications, he has led a productive and successful life in spite of his discharge from the Air Force for drug abuse with a general service characterization.

The complete advisory opinion is at Exhibit E.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 13 Feb 24 for comment (Exhibit F) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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. The Board concurs with the rationale of the AFRBA Psychological Advisor and the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. There is no evidence of a mental health condition or

mental health treatment during the applicant's military service. To date, the applicant is not service-connected for any mental health condition, including PTSD and/or TBI. Additionally, 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. Liberal consideration has been appropriately applied by the AFRBA Psychological Advisor and the Board agrees with their finding that the applicant's mental health conditions do not excuse or mitigate his discharge. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information/criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2023-00426 in Executive Session on 23 May 24 and 30 May 24:

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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, w/atch, dated 15 Oct 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 2 Jan 24.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 16 Jan 24.
- Exhibit E: Advisory Opinion, AF/JAJI, dated 24 Jan 24.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 13 Feb 24.

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.

6/20/2024

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