

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00706

XXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

He was recommended to write the Board for review by an Airman he met while serving. The Airman successfully upgraded his discharge from a bad conduct dishonorable discharge to an honorable discharge and he believes he too deserves a similar outcome. Furthermore, his enlisted performance reports (EPR) more accurately depict his character of service. He hopes his character of discharge will reflect his EPRs which is that of a progressive, professional, and outstanding Airman who started a war.

Unlike the other Airman, he was not court-martialed, did not serve any jail time, and his discharge was administrative. He served with distinction during his time in the military, directly contributing to the war effort in Iraq. He successfully troubleshooted computer systems that allowed the B-52 stealth bombers to take flight and begin their bombing campaigns during *Work-Product*. This effort directly impacted the success of their mission, and had it not been for his contributions, the bombers may have failed their mission.

Despite being disciplined for marijuana use in the now legalized state of California, he still received a recommendation for an upgrade to honorable letter from his supervisor, in part due to his outstanding work and professionalism. Secondly, all of his performance reports were "4s" and "5s."

It is a point of great frustration to him that a fellow comrade, with a bad conduct dishonorable discharge was able to successfully upgrade to an honorable discharge on their first attempt, despite having served less time and having a record of drug abuse and court-martial. In contrast, he attempted to appeal his discharge status once already and was denied. It seems unfair that an individual with far worse circumstances than his can receive grace and mercy, while he is left to deal with undiagnosed mental health conditions and the impact of depression after being robbed of the recognition he deserves for his contributions to our nation's war efforts.

He rightfully developed depression as a result of being dishonored for his war contributions, and at 22-years old, handled it poorly by self-medicating. He watched someone else become highly decorated for what he personally did, causing bitterness, depression, and alienation to set in. This combined with the undiagnosed mental conditions documented by his clinical Air Force psychiatrist, led him to self-medicate with marijuana. He is not making excuses, but he was young at the time of his discharge and tried to cope with the injustice he felt.

In support of his request, the applicant provides a personal statement, copies of military evaluations, post-service college transcript, and a character reference.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 11 May 05, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), when between on or about 17 Feb 05 and on or about 17 Mar 05, he wrongfully used marijuana, in violation of Article 112a, UCMJ. As punishment, the applicant was reduced in grade to E-1, with a new date of rank of 11 May 05 and forfeited \$617 of pay.

On 24 May 05, the applicant's commander recommended he be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.54. *Drug Abuse*. The specific reason for the action was on or about 17 Feb 05 and on or about 17 Mar 05, the applicant wrongfully used marijuana.

The discharge authority directed the applicant be discharged for drug abuse, with a general (under honorable conditions) service characterization. Due to the basis of the discharge [drug abuse], probation and rehabilitation was not applicable.

On 1 Jun 05, the applicant received a general (under honorable conditions) discharge. His separation code and corresponding narrative reason for separation is JKK, *Misconduct*. He was credited with 3 years, 10 months, and 2 days of total active service.

On 3 Aug 18, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 14 May 19, 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 advisory at Exhibit D.

POST-SERVICE INFORMATION

On 23 Mar 23, 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 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 Wilke 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 Wilke Memo.

On 23 Mar 23, 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 finds after an exhaustive review of the available records, insufficient evidence has been presented to support the applicant's desired change to his records. The applicant may consider submitting his service treatment records for reconsideration of his petition.

A review of the available records finds inconsistent reporting from the applicant and/or the applicant's contentions could not be supported by his objective military records. The applicant

claimed he had undiagnosed mental health conditions and met with a psychiatrist during service. His service treatment records are not available or submitted by the applicant for review and so his contention could not be substantiated. The applicant made various reports about his mental health condition supposedly occurring during service to his Department of Veterans Affairs (DVA) providers over 10 years after discharge. During his initial visit/mental health evaluation at the DVA on 2 Jun 16, he reported beginning to use marijuana “religiously” since 2001 in response to a stressful situation (not a Criterion A event such as exposure to death, serious injury or sexual violence) that was interpersonal and possibly racially motivated. His Article 15 and the basis for his discharge was for marijuana usage between on or about 17 Feb 05 and on or about 17 Mar 05. If the timeline of events he provided to his DVA provider was accurate, then his marijuana usage had begun early in his military career and about four years before his discharge. This would indicate his marijuana use was not a one-time occurrence but had recurred for several years or occurred on more than one occasion. Additionally, his explanation to his DVA provider for his marijuana use is not the same explanation he provided for this petition, which was he used marijuana because he was feeling bitter, depressed, and alienated from being robbed of recognition. He did, however, report this similar explanation to a different provider during his SATP [Substance Abuse Treatment Program] evaluation on 7 Jun 16. The applicant did not specify when the incident of being robbed of recognition occurred and there is no evidence to corroborate his claim as well. Interestingly, he informed his SATP provider that following the event in which another Airman took credit for his accomplishment, he noted the event triggered a rebellious side of him leading to his marijuana use. The provider did not explain the notion behind his rebellious behavior and so his behavior could be impulsive or purposeful. The applicant claimed he was diagnosed with Cannabis Abuse by a Clinical Psychologist during service at his initial evaluation and provided documentation of that visit which noted he would benefit from further evaluation to rule out oppositional defiant disorder, ADD [attention deficit disorder], bipolar disorder and/or a characterological disorder. He was also told he had a disorder in the schizophrenia spectrum. His DVA provider did not verify whether he had received further evaluation to confirm many of these conditions or diagnoses but during a subsequent evaluation for SATP, he claimed being diagnosed with bipolar disorder and schizophrenia in the military and had stress-induced seizures while on active duty. These various reports of having different conditions and diagnoses contrast his contention of having undiagnosed mental health conditions during service. All of his claimed conditions and diagnoses could not be confirmed due to the lack of records.

The applicant’s available military records, which included his three EPRs, reflected no documentations or observations he had any mental health conditions or concerns to include depression during service. He reported to his DVA providers he experienced depressive symptoms of sadness, periods of anhedonia, feelings of guilt and worthlessness, reduced energy, poor concentration and memory difficulties, sporadic appetite, psychomotor agitation, and poor sleep. There is no evidence he experienced any of these symptoms during service mainly because his service treatment records were absent from his records. This psychological advisor concedes it is possible the applicant had self-medicated with marijuana as contended, but his inconsistent reporting makes it difficult to corroborate his contentions and to determine the actual reason for his drug use. The burden of proof is placed on the applicant to submit the necessary paperwork and/or records to support his claims and request. More information, especially his service treatment records, is needed to determine if his mental health condition was or could be a mitigating factor to his discharge. Therefore, this psychological advisor finds no error or injustice with the applicant’s discharge from a mental health standpoint.

Liberal consideration is applied to the applicant’s request based on his contention of a mental health condition. 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 another Airman became highly decorated for what he personally did causing him to feel bitter, depressed, and alienated. He claims this situation combined with his undiagnosed mental health conditions documented by his Air Force psychiatrist led him to self-medicate with marijuana.

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

The applicant's service treatment records were not available or submitted by the applicant for review and as such, there is no evidence he had any mental health conditions to include depression during service. He reported to his DVA providers, over 10 years post-discharge, he was diagnosed with cannabis abuse, bipolar disorder, and schizophrenia during service. No records exist to corroborate these conditions or diagnoses.

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

Although the applicant's contention of self-medicating with marijuana is plausible, his inconsistent reporting makes it difficult to substantiate whether his mental health condition could actually excuse or mitigate his discharge. More information would be needed to corroborate his contention and the burden of proof is placed on the applicant to submit the necessary records to support his contentions and request. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's 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 D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 Aug 23 for comment (Exhibit E) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. 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 limitation period established by 10 U.S.C. § 1552(b).

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 the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no documentation supporting the applicant's contentions of mental health conditions and/or diagnoses while serving. 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. 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, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-00706 in Executive Session on 14 Dec 23:

, 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/atchs, dated 1 Mar 23.
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 23 Mar 23.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 31 Jul 23.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Aug 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.

X

Board Operations Manager, AFBCMR