



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2023-03079

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His grade of technical sergeant (E-6) with his original date of rank (DOR) of 1 Dec 17 be restored and he receive all backpay and allowances.
2. His Article 15 dated 31 May 22 be removed from his records.
3. His letter of reprimand (LOR) and unfavorable information file (UIF) be removed from his record.
4. His referral enlisted performance report (EPR) for the reporting period ending 31 Jan 23 be removed from his records or be replaced with a corrected EPR.

APPLICANT'S CONTENTIONS

In Jan 23, the administrative discharge board found the allegation he wrongfully used marijuana was unsubstantiated and there was no basis for his discharge. In view of the findings, he requested his Article 15 for violation of Article 112a, Uniform Code of Military Justice (UCMJ), wrongful use of marijuana be set aside. However, his request was denied. He filed an inspector general (IG) complaint; however, the group commander (GP/CC) denied his request to set aside his Article 15.

He unknowingly and innocently used a topical cannabis product which caused him to test positive for tetrahydrocannabinol-9 (THC-9) at 21 nanograms/milliliters (ng/ml). After his Article 15, he discovered his wife had unknowingly given him a salve containing cannabis. He used the salve throughout Apr for pain relief from an ankle sprain. The toxicologist from the Air Force Drug Testing Laboratory testified at his discharge board his test results were consistent with the topical use of a cannabis salve, such as the one he had been using at the time of the positive urinalysis. The lowest cutoff for a positive test is 15 ng/ml, 4,000 ng/ml would be considered a high concentration and his positive test was 21 ng/ml. He has had no other administrative actions and has remained professional since the allegations were made.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a currently serving Air Force staff sergeant (E-5).

**AFBCMR Docket Number BC-2023-03079
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

CUI//SP-MIL/SP-PRVCY

On 2 May 22, the applicant was notified he was selected to provide a urine specimen for inspection testing.

On 16 May 22, his unit was notified of the applicant's positive urinalysis. The positive test result was for THC-9 at 21 ng/ml, with a Department of Defense cutoff of 15 ng/ml for a positive test result.

AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*, dated 31 May 22, reflects the applicant received an Article 15 for wrongful use of marijuana between 11 Apr 22 and or about 2 May 22. Punishment included reduction to the grade of E-5, with DOR of 15 Jun 22.

On 16 Jun 22, the applicant appealed the Article 15 and requested it be withdrawn because he did not wrongfully use marijuana. The positive test result stemmed from his innocent application of a salve containing cannabis. He was unaware until 15 Jun 22, the salve contained cannabis. The salve was given to him by his wife who received it from his mother-in-law. He provided statements from his mother-in-law and wife. His mother-in-law stated she had given the salve to her daughter due to the pain in her hand. She did not tell her daughter the salve contained medical marijuana. The applicant's wife then gave it to him for his back and ankle pain.

On 11 Jan 23, a discharge board convened to determine if the applicant should be discharged for drug abuse or retained. The discharge board found the applicant between 11 Apr 22 and 2 May 22 did not wrongfully use marijuana. The finding did not form a basis for discharge under DAFI 36-3211, *Military Separations*. Since it had not been shown by a preponderance of the evidence a drug offense was committed by the applicant, the discharge board recommended he be retained.

The applicant received a referral EPR for the period ending 31 Jan 23 for the Article 15.

On 15 May 23, his commander denied his request the Article 15 be set aside.

On 19 May 23, the applicant filed an IG complaint alleging his commander abused his authority by not setting aside his Article 15 based on the discharge board's findings. He stated had information been available at the time of his Article 15, a rational decision would have been made to terminate the proceedings.

On 19 Jul 23, the GP/CC informed the applicant he conducted an inquiry to review his complaint. The inquiry did not substantiate the finding his commander abused his authority when he determined to not set aside the Article 15. The applicant was advised he could petition the AFBCMR for the correction of his records.

The applicant's records do not include any LOR. The military personnel data system (MilPDS) reflects the applicant has a UIF, with a disposition date of 14 Jun 24.

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

AIR FORCE EVALUATION

AF/JAJI recommends denial. The applicant contends the discharge board's findings prove there was an error or injustice in the Article 15. However, AF/JAJI disagrees and find the discharge board's findings do not affect the legal sufficiency of the commander's nonjudicial punishment (NJP). The discharge board and NJP are independent processes and the discharge board is not a

review of an NJP that changes an NJP's determination. An appellate review of the NJP was conducted and the applicant's request was denied. The applicant presents a mere difference of opinion between the commander and the administrative discharge board, not a legal error. Just as AF/JAJI would defer to the fact finder and not challenge the administrative discharge board's findings and recommendation, AF/JAJI defers to the fact finder and preserve the commander's NJP findings and punishment.

The commander did not abuse his discretion in administering the NJP, finding the applicant committed the offense as alleged, imposing punishment or denying the set aside request. The punishment imposed was within the permissible range for the applicant's offense. The applicant could have demanded court-martial in lieu of NJP; however, he opted to accept the Article 15, with the full knowledge of its evidentiary and deliberative process. The applicant appealed the Article 15 and the appellate authority denied his request. The applicant has not submitted any new evidence or information that casts doubt on the legal sufficiency of the NJP.

The complete advisory opinion is at Exhibit C.

AFPC/DPMSM recommends denial for removal of the Article 15. The administrative discharge board exonerated the applicant of the alleged offense and recommended retention in the Air Force. DAFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers*, indicates an administrative board makes findings and recommendations regarding the proposed administrative separation of members. Within this reference, there is no indication to what extent the discharge board's authority is conveyed to NJP, if at all. Even though the allegation was no longer founded by the discharge board, the adverse action was upheld, separate from the board's findings. Therefore, in accordance with DAFI 36-2907, *Adverse Administrative Actions*, the UIF and all its contents (including the Article 15) should be maintained until the final disposition date unless early removal of the UIF or document is clearly warranted.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 20 Nov 23 for comment (Exhibit E) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant did not exhaust all available non-judicial relief for removal of his referral EPR before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendations of AF/JAJI and AFPC/DPMSM against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. While the Board notes the applicant's commander was within his authority to issue the applicant the NJP, the Board agrees with the discharge board's finding that applicant did not wrongfully use marijuana when he used the salve for back and ankle pain. Specifically, the Board finds the applicant was not aware of the contraband nature of the salve and that the THC in the salve caused the positive urinalysis result. The Board finds the letters of support from his wife and mother-in-law persuasive to find the applicant was not aware the salve contained THC. Additionally, the credibility of applicant's claim of innocent ingestion of THC is scientifically

supported by the toxicologist from the Air Force Drug Testing Laboratory who testified at the discharge board hearing that applicant's test results were consistent with the topical use of a cannabis salve, such as the one the applicant used before, he provided the urine that tested positive for THC. Since the Board agrees with the discharge board that applicant did not wrongfully use marijuana it would be an injustice for his record to reflect adverse actions for that misconduct. With respect to the request for removal of the LOR, while a reprimand was included as part of the nonjudicial punishment, the Board notes the applicant's records do not contain any LOR; therefore, no action by the Board is required for removal of the LOR. Therefore, the Board recommends correcting the applicant's records as indicated below.

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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. His grade of technical sergeant (E-6) with his original date of rank (DOR) of 1 Dec 17 be restored and he receive all backpay and allowances.
- b. AF Form 3070B, *Record of Nonjudicial Punishment Proceedings* (TSgt thru CMSgt) dated 31 May 22 be removed from his records.
- c. His UIF with disposition date 14 Jun 24 be removed from his records.
- d. AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, for the reporting period of 1 Dec 21 to 31 Jan 23 be void and removed from his records and replaced with an AF Form 77, *Letter of Evaluation* which states "Not rated for the above period. Evaluation was removed by Order of the SecAF."

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-2023-03079 in Executive Session on 12 Mar 24:

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

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 21 Sep 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 24 Oct 23.
- Exhibit D: Advisory Opinion, AFPC/DPMSMM, dated 15 Nov 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Nov 23.

CUI//SP-MIL/SP-PRVCY

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.

5/15/2024

Work-Product

Board Operations Manager, AFBCMR

Work-Product