



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03126

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

1. His under other than honorable conditions (UOTHC) discharge be upgraded to honorable
2. His grade at discharge be changed to senior airman (E-4).

### APPLICANT'S CONTENTIONS

His other than honorable characterization is unfair because it resulted from a charge for marijuana use he was already being separated for and his commander and the staff judge advocate acknowledged he was addicted. His first sergeant recommended treatment, which he successfully completed, and he heavily regrets using marijuana while in the Air Force, recognizing it is not compatible with military service. Although he had personal problems, he always performed his specialty duties to the best of his ability. He was self-medicating for a disorder he did not know he had at the time. It was a privilege to serve, and since being discharged, he has worked to improve himself and is now an established and reputable artisan/craftsman.

In support of his request for a discharge upgrade, the applicant provides copies of medical and military discharge records, an email from this mother, community college transcripts, a personal statement and pictures describing his post-service work, a letter of appreciation, and a Federal Bureau of Investigation (FBI) Identity History Summary (IdHS).

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 23 Sep 03, the applicant requested a discharge in lieu of trial by court-martial.

On 2 Oct 03, the applicant's commander recommended the applicant be discharged from the Air Force under the provisions of AFI 36-3208, *Administrative Separation of Airmen*. The specific reasons for the action were:

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- a. On divers occasions between on or about 28 Jan 02 and 14 Apr 02, he failed to make his monthly government travel card payments, for which he received an Article 15, dated 6 May 02.
- b. Between 1 Jan 03 and 12 May 03, he wrongfully used marijuana, for which he received an Article 15, dated 7 Jul 03. During preparation for a recommended general (under honorable conditions) discharge, a urinalysis (UA) revealed he again used marijuana after receiving the Article 15 and was recommended for a trial by special court-martial.
- c. It is further noted the applicant received Letters of Reprimand (LOR) for being late to work, for speeding and reckless driving, and for failing to register his vehicle within the required 30 days.

An undated memorandum from the Staff Judge Advocate (SJA) found the discharge action legally sufficient.

On 8 Oct 03, the discharge authority directed the applicant be discharged in lieu of trial by court-martial, with a UOTHC service characterization.

On 14 Oct 03, the applicant received a UOTHC discharge. His narrative reason for separation is “Triable by Court Martial” and he was credited with four years, four months, and six days of total active service.

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 6 Dec 23, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide an FBI IdHS, 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 previously provided an FBI report, dated 21 Sep 23, with his DD Form 149. According to the report, the applicant has had no arrests since discharge.

#### **APPLICABLE AUTHORITY/GUIDANCE**

On 3 Sep 14, the Secretary of Defense issued a memorandum, known as the Hagel Memo, 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 post-traumatic stress disorder (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, known as the Kurta Memo, 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 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 must 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 6 Dec 23, the Board staff provided the applicant a copy of the liberal consideration and clemency 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**

The AFRBA Psychological Advisor completed a review of all available records and finds the applicant's contention compelling, but with some noted discrepancies. Nonetheless, the Psychological Advisor recommends upgrading his character of service to general (under honorable conditions), the originally intended characterization, due to his contention drug use was in part caused by self-medication of his mental health condition based on liberal consideration. The Board could upgrade his discharge to honorable as requested should the Board deem his service merited this characterization. This decision is at the Board's discretion.

The applicant claimed he was self-medicating for a disorder and did not know what was happening at the time. The Air Force Office of Special Investigations (OSI) report revealed he was briefly seen by a mental health provider, diagnosed with major depressive disorder (MDD) in Jun 01, and declined further help. Thus, he most likely was aware he had a mental health condition or concerns at that time. It is unknown if he was aware of the actual mental disorder diagnosis he received, but he had mental health difficulties or issues necessitating a visit to the clinic for an evaluation. The applicant's commander and the SJA both stated in their memorandums the applicant had acknowledged he struggled with marijuana and met with an off-base counselor. Records from this off-base counseling were not available or submitted for review, but his revelation and response to the insight into his struggles would indicate he was aware of his difficulties or distress. He reported having addiction problems in his petition as well. It is possible the applicant had self-medicated as claimed because records reflect, he had depression/was diagnosed with MDD as early as 2001

preceding the discovery of his marijuana usage in 2003. Also, when he was hospitalized in Jul 03, he was observed to be depressed and received a diagnosis of dysthymic disorder. It appeared his diagnosis was changed from MDD to dysthymic disorder over time because the latter, now known as persistent depressive disorder, is defined as depressed mood for most of the day, for more days than not, for at least two years. As stated previously, it is unclear from the existing records of the onset and cause(s) of his depression.

Although there is evidence he had depression during his time in the service, there is also evidence in the records he did not have a mental health condition impairing his judgment at the time of his marijuana use. His commander's memorandum clearly stated, at the time of the misconduct, the applicant did not have a mental disease or defect that caused him to lack the substantial capacity either to appreciate the criminality or wrongfulness of the acts, or to conform to the law. The statement would not have been made by his commander without consultation or evaluation from a duly qualified mental health provider. Furthermore, the applicant was cleared by the mental health clinic in Dec 01, about six months after he was initially diagnosed with MDD, presumably to deploy to *Work-Product*, *Work-Prod...*, due to the timeline from the records. It appeared he was successful during deployment because no behavior, misconduct, or performance issues were reported during this deployment. If his MDD was present or severe at the time of his pre-deployment evaluation, he would not have been able to deploy and especially would not be able to complete his deployment without any difficulties from his depressive symptoms. It appeared his MDD had cleared, resolved, or was well-managed by the time he was deployed. The OSI report describing his behaviors and actions via his former roommate's account did not observe or report he was depressed, anxious, in emotional distress, etc. at the time of his marijuana use. When the roommate confronted the applicant after catching him using marijuana, the applicant flushed the marijuana down the toilet and told the roommate it was hard for him not use to marijuana because he could get it across the street or from an old neighbor. These behaviors were not caused by depression, anxiety, etc., or self-medication but by substance abuse or dependency problems.

The applicant may have coped with his mental health condition at the time of service as contended, but none of his available records, including his hospital discharge summary, explicitly stated he used marijuana and/or alcohol to cope with his depression or condition. There is clear evidence he had substance abuse problems requiring him to receive detox/hospital treatment and was given diagnoses of alcohol dependency and polysubstance dependency by his hospital provider. A substance abuse/dependency problem is an unsuiting condition for military service. It is noted the applicant's commander and the SJA reported the applicant stopped smoking marijuana briefly after he received an Article 15 for marijuana use and resumed after he was notified of his discharge action. There could be a few potential reasons for his behaviors. He could have resumed smoking because he realized he was getting discharged from the military and it no longer mattered to him to abide by the rules; he could be stressed or upset from his discharge action caused by his own misconduct leading him to use marijuana in response to his occupational stressor; or he could have used his marijuana to cope with his depression. His hospital discharge summary reported he appeared depressed and anxious and was drinking heavily for about two to three weeks before coming to the hospital. At around this time, he had already tested positive for marijuana, and disciplinary and discharge actions were being initiated. His second positive UA test was read on 28 Jul 03 per the OSI report. He was hospitalized during this time, but it seemed he had provided

a UA sample on, near, or around the time of his admission to this hospital. He may have known he would test positive for marijuana again at the time of hospitalization. From this timeline, it appeared his alcohol and substance abuse had resumed and/or increased in relation to his occupational and possibly legal stressors. The second positive UA, which yielded tetrahydrocannabinol (THC) levels significantly higher than his first positive UA, caused him to be referred to a court-martial, changed his service characterization from general to UOTHC, and was an important factor in requesting discharge in lieu of a court-martial.

There is competing information implying he could have used marijuana to cope with his mental health condition but records state he did not have a mental health condition at the time of his drug use. The benefit of the doubt is given to the applicant, so his contention he had self-medicated with marijuana is accepted. Co-occurring disorders or conditions are not uncommon. His mental health condition would mitigate his drug use. Nevertheless, his marijuana use may be one of his more serious misconducts but was not the only reason for his discharge request. He had received several disciplinary actions such as failing to pay his government travel card for which he had received his first Article 15, five letters of reprimands for failing to obey a lawful order, speeding and reckless driving, missing an appointment, failing to report to work, and being late for work and two letters of counseling for failure to meet obligations and government card misuse. He had submitted at least one response to his disciplinary action explaining his failure to pay his government travel card. He provided a lengthy summary explaining the reason for his failure to pay his debt—he had used his travel voucher to pay for his car repair instead of his travel card. He made no mention of having any mental health issues that caused his decision, and his decision was not demonstrated to be caused by his mental health condition. There was also no evidence or records his remaining numerous misconducts were caused by his mental health condition and some of his misconduct had occurred before he was diagnosed with MDD. The applicant did not address his other misconduct besides his marijuana use in his petition.

Since the applicant's marijuana use was mitigated by his mental health condition and his remaining misconducts were not, the Psychological Advisor opines his request for an honorable discharge is not supported by his records. Most of his misconducts were assessed to not be caused by his MH condition and his drug use was partially due to his unsuiting substance dependency problems. Prior to his second positive UA test, his commander had recommended he receive a general (under honorable conditions) discharge and changed his characterization because of his continued marijuana use and second positive UA.

In terms of the applicant's request to change his grade to E-4, his grade was reduced from senior airman to airman basic for receiving an Article 15 for marijuana use. Although he may have used marijuana to cope with his mental health condition, it is the opinion of the Psychological Advisor his marijuana use may have partially mitigated his discharge but using a known illicit drug knowingly and repeatedly does not completely exempt him from receiving the consequences of disciplinary actions from his misconducts. Thus, his request to change his grade is not supported.

Liberal consideration is applied to the applicant's petition because he contended having an MH condition. Liberal consideration is not appropriate to be applied to his request to change his grade because this request is not covered under this policy. As a reminder, liberal consideration does not

mandate an upgrade per policy guidance. The following are answers to the four questions from the Kurta Memorandum after reviewing the applicant's available records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?  
The applicant contends he self-medicated with marijuana for a disorder and did not know what was happening at the time.
2. Did the condition exist or experience occur during military service?  
There is evidence the applicant's mental health condition had existed and occurred during his military service. He was diagnosed with MDD in Jun 01 per the OSI report and was diagnosed with dysthymic disorder, alcohol dependency, and polysubstance dependency from his hospital treatment in Jul 03.
3. Does the condition or experience actually excuse or mitigate the discharge?  
There are records and evidence to support the applicant may have self-medicated his depression or mental health condition with marijuana and records also exist to support he did not have a mental health condition or defect impairing his judgment at the time of his drug use. Most of his misconducts such as failing to pay his debts, misusing his government card, failing to obey an order, reporting late to work, not reporting to work, speeding and driving recklessly, and missing an appointment were assessed to not have been caused by his mental health condition and his marijuana use was also found to be in part caused by his unsuited substance dependency problems. The benefit of the doubt is given to the applicant and his contention of self-medicating his mental health condition with marijuana is accepted as a reason causing his drug use and would partially mitigate his discharge.
4. Does the condition or experience outweigh the discharge?  
Since the applicant's mental health condition partially mitigated his discharge, his mental health condition would outweigh his discharge to support an upgrade to at least a general (under honorable conditions) characterization.

The complete advisory opinion is at Exhibit D.

AF/JAJI completed a review of all available records and finds no evidence to support the applicant's allegation of injustice. His contention is it was unjust to charge him for his Sep 03 marijuana use since he was already in the process of being separated for his Jul 03 marijuana use. AF/JAJI finds no merit in this argument as it would create lawlessness to permit airmen to freely commit further misconduct simply because they are already in the process of being discharged. The applicant also alleges he suffered from marijuana addiction. It is noted the AFRBA Psychological Advisor has recommended a discharge upgrade to a general (under honorable conditions); however, AF/JAJI disagrees with this recommendation for several reasons. To the extent the applicant frames his addiction as a mental health issue, AF/JAJI does not opine on mental health claims. However, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against the applicant's requested discharge upgrade. According to Paragraph 19 of the attachment to 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. In the present case, the applicant continued to use marijuana because he was already being separated for marijuana use. Such misconduct was willful in that it required deliberation on the part of the applicant and was therefore “premeditated” as that term is used in the Kurta Memorandum. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge. Furthermore, to excuse a crime because it resulted from an addiction would open the door to contentions of drug addiction, alcohol addiction, pornography addiction, sex addiction, etc. This would have an untenable impact on good order and discipline.

Finally, any request for clemency necessarily requires an examination of an applicant’s total civilian and military history. The applicant’s criminal background check reveals a 1998 arrest and fine for theft prior to military service. During only four years in the Air Force, he received five LORs, two non-judicial punishments, and a referral to a special court-martial. His command made repeated rehabilitative efforts and was even in the process of administratively separating him with a relatively favorable general (under honorable conditions) discharge after his first positive UA. In a final act of compassion, although a trial by special court-martial with a possible guilty verdict and bad conduct discharge would have been appropriate, the sympathetic legal reviews show command recognized his marijuana addiction and approved the applicant’s voluntary request for an administrative discharge. The totality of the evidence shows the Air Force already liberally granted clemency to no avail. Therefore, AF/AJAI finds an UOTHC is an appropriate service characterization, and no upgrade is warranted on the basis of clemency.

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 28 Mar 24 for comment (Exhibits F) and the applicant replied on 29 Apr 24. In his response, he contends he did not intend to suggest he was not remorseful for his marijuana usage. He had a pre-existing mental health condition he was not aware of until he spoke to his mother and did not discuss this further when being processed for discharge for fear of being accused of fraudulent entry. His other misconduct, reckless driving was plead down to speeding and he made some bad financial decisions; however, he was seen as an asset to his unit and was allowed to reenlist in 2003. He also submitted additional character references and medical evidence to support his request for a discharge upgrade.

The applicant’s complete response is at Exhibit G.

## **FINDINGS AND CONCLUSION**

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant has presented evidence sufficient to demonstrate an injustice regarding part, but not all, of his request. While the Board finds no error in the original discharge process, the Board recommends partial relief based on liberal consideration and concurs with the rationale and recommendation of the AFRBA Psychological Advisor to grant him a discharge upgrade to general (under honorable conditions). In particular, the applicant’s records and submitted evidence shows he may have used marijuana as self-medication for his diagnosed mental health condition, giving him the benefit of the doubt for his contention. However, for the remainder of the applicant’s request, the evidence shows he did not have a mental health condition or defect impairing his judgment at the time of his drug use and his other misconduct is not excused or mitigated by his mental health disorder. His marijuana use was also found to be caused in part by his unsuited substance dependency problems. Although the applicant’s discharge may have been partially mitigated by his marijuana use to cope with his mental health condition, using a known illicit drug repeatedly does not completely exempt him from receiving the consequences of disciplinary actions for his misconduct. Thus, his request to change his grade or upgrade his discharge to honorable is not supported. The Board therefore finds no basis to recommend granting that portion of the applicant’s request.

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 on 14 Oct 03, he was discharged with service characterized as general (under honorable conditions), and a separation code and corresponding narrative reason for separation of JFF (Secretarial Authority).

**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-2023-03126 in Executive Session on 19 Feb 25:

- 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 27 Sep 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 6 Dec 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 24 Jan 24.
- Exhibit E: Advisory Opinion, AFRBA Legal Advisor, date 25 Mar 24

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Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Mar 24.  
Exhibit G: Applicant's Response, w/atchs, dated 29 Apr 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.

3/7/2025

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Board Operations Manager, AFBCMR  
Signed by: USAF

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