



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03325

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NOT INDICATED

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

It has been over 10 years and the Air Force never actually drug-tested him. They only went off of his word. Due to being deployed to **Work-Product**, Qatar, he is in need of medical assistance for Post-Traumatic Stress Disorder (PTSD) and other mental health issues.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 7 Jun 07, according to Special Court-Martial Order (SCMO) **Work-Product** dated 25 Jul 07, the applicant was arraigned on the following offenses:

- Charge: Article 112a. Plea: G. Finding: G.

- Specification: Did, within the continental United States, on or about 15 Feb 07, wrongfully use cocaine. Plea: G. Finding: G.

The applicant was sentenced to a bad conduct discharge.

According to SCMO **Work-Product**, dated 12 Sep 08, the sentence to a bad conduct discharge as promulgated in SCMO **Work-Product** dated 25 Jul 07, has been finally affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed. The sentence was adjudged on 7 Jun 07.

On 10 Oct 08, the applicant received a bad conduct discharge. His narrative reason for separation is "Court-Martial (Other)" and he was credited with 4 years, 8 months, and 28 days of total active service.

On 9 Feb 17, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

AFBCMR Docket Number BC-2023-03325

Work-Product

Work-Product

On 2 Nov 17, the AFDRB concluded the applicant's punitive discharge by a Special Court-Martial was appropriate based on the facts and circumstances of the case and there was no sufficient basis, as an act of clemency, to change the discharge.

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 10 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 10 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 change to his records based on his mental health condition.

A review of the available records finds the applicant's contentions were not supported by his objective military records. His available objective military records are limited and there are no records confirming he had deployed to Qatar or Al Udeid, but this is a possibility. His treatment records from his residential treatment at Point Loma did report he had deployed overseas but did not indicate the location of his deployment or the time frame of his deployment. The applicant claimed he developed PTSD from this deployment experience and did not provide a description of his actual traumatic experiences or how his military duties caused him to develop PTSD. There are no records he reported experiencing any traumatic experiences or PTSD symptoms during service. There are no records he had PTSD or a similar condition during service and in fact, there are no records he was diagnosed with PTSD by a duly qualified mental health professional during or after service. The applicant was initially seen on 6 Feb 07 during service for endorsing suicidal ideation and a recent gesture of cutting. Subsequent treatment notes revealed he had suicidal ideation and had cut himself while he was intoxicated due to having marital problems and was

command referred to the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program after he disclosed “a chronic pattern of weekend binge drinking.” He was given diagnoses of Alcohol Abuse, Alcohol Dependence, and Major Depressive Disorder (MDD) during service. For his condition of MDD, his treatment records reported he had a depressive episode from Sep 06 to Oct 06 when he returned from an overseas deployment and his wife and son had left their home. He reported they actually left in Mar 06 and when he returned home, their absence became real to him. His family or marital problems were not related to his deployment or caused by his military duties and may have occurred prior to or early in his deployment. With alcohol treatment, his alcohol problems improved, and he was not discharged due to his alcohol problems. The applicant was discharged from service because he was convicted at Special Court-Martial for cocaine use on or about 15 Feb 07. The applicant claimed there was no drug test, but it was based on his own words which would signify he admitted to using cocaine. He never explicitly contended in his petition he used cocaine to cope with PTSD. Interestingly, the applicant was evaluated by the ADAPT program and received residential treatment for his alcohol dependency problems around or after the time of his reported cocaine use, and none of his treatment records discussed his cocaine use. He was reported to have used alcohol to cope with, or in response to, his marital problems and stressors and there are no records he used cocaine to cope with his stressors. It is possible he used cocaine during this time period as he was already using another substance to cope with his stressors, but there is no actual evidence or records he used cocaine to cope with PTSD or received treatment for cocaine use. Due to his contentions not being consistent with his service treatment records, and no records or evidence he may have had PTSD at the time of his substance use, this psychological advisor finds his contention as not compelling or sufficient evidence to support his request, especially since he was convicted at a Special Court-Martial for using an illicit Schedule II controlled substance that he acknowledged using based on his own words. He also did not submit any records to support his contention and the burden of proof is placed on the applicant to submit the necessary records to support his claim. The Board may choose to upgrade his discharge to general (under honorable conditions) as requested should the Board find his contention as compelling for an upgrade, but this psychological advisor finds no error or injustice with the applicant’s discharge from a mental health perspective.

Liberal consideration is applied to the applicant’s petition due to his contention of a mental health condition. 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 contends he developed PTSD from his deployment to Qatar or Al Udeid. He claimed he was never drug tested but was charged based on his own words. He did not report using cocaine to cope with his PTSD and said he was in need of medical assistance for PTSD and other mental issues.
2. Did the condition exist, or experience occur, during military service?
There is no evidence the applicant’s mental health condition of PTSD had existed or occurred during his military service. He was never diagnosed with this condition during service or after service. He was diagnosed with Alcohol Abuse, Alcohol Dependence, and MDD during service and received ADAPT and residential treatment for his alcohol dependency problems. His treatment records reported he was depressed after he returned home from deployment and his wife and son were not home although he reported they moved out about six months prior which could indicate they left prior to his deployment or early in his deployment. There are no reports or records that his military service or deployment experiences caused him to develop PTSD or a similar condition. There are no records clearly stating he was deployed to Qatar or Al Udeid although this is possible since his treatment records did report he deployed overseas. There are no records or reports he used cocaine or received treatment for his cocaine use during service.
3. Does the condition or experience actually excuse or mitigate the discharge?

Although it is possible the applicant may have used cocaine to cope with his personal stressors as his reported cocaine use occurred around the time he was using alcohol to cope with his marital and family stressors, there is no actual evidence to support this impression. There is no evidence or records that the applicant's mental health condition of PTSD or any other mental health condition had a direct impact on his wrongful cocaine use, Special Court-Martial conviction, and subsequent discharge from service. His contentions were inconsistent with his service treatment records and the applicant did not submit any records to support his contentions. His mental health condition or experience does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit D.

AF/JAJI recommends denying the application as they found no evidence that would undermine the applicant's voluntary guilty plea at Special Court-Martial.

The applicant's request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence. Consequently, pursuant to Title 10, United States Code § 1552(f) (10 USC § 1552(f)), the Air Force Board for Correction of Military Records (AFBCMR) is limited to two types of action: (1) correction of a record to reflect an action taken by review authorities under the Uniform Code of Military Justice (UCMJ); or (2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the AFBCMR can act only on the sentence, but only on the basis of clemency and not on the basis of alleged legal error or injustice. After careful review, we find insufficient evidence of error regarding the first type of authorized correction. Regarding the second type of authorized correction on the basis of clemency, we find no basis to support a discharge upgrade.

The applicant's contention that the Air Force failed to conduct a urinalysis is contradicted by the available records and is an insufficient basis for clemency. He both tested positive for cocaine and voluntarily pled guilty to wrongfully using cocaine. Although the urinalysis record is not available, notes in the Air Force's Automated Military Justice Analysis and Management System (AMJAMS) state on 23 Mar 07, the Air Force Drug Demand Reduction Program notified the Air Force Office of Special Investigations (AFOSI) that the applicant's 20 Feb 07 urinalysis sample had tested positive for cocaine at a level of 332 ng/ml. The Department of Defense cut-off level for cocaine is 100 ng/ml. In a subsequent interview with AFOSI, the applicant admitted to driving to downtown Dover, Delaware, in search of cocaine, buying cocaine from an unknown dealer, then using it in his home kitchen. He also voluntarily pled guilty to cocaine use at a trial by Special Court-Martial on 7 Jun 07.

Despite the lack of urinalysis records, we rely on the presumption of regularity to conclude a urinalysis was properly conducted. Federal courts have long recognized the strong presumption of regularity accompanying government proceedings, including that the military carries out its responsibilities properly, lawfully, and in good faith. See *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003); *Porter v. United States*, 163 F.3d 1304, 1316 (Fed. Cir. 1998), *Berkley v. United States*, 59 Fed. Cl. 675, 693 (2004). Both the AMJAMS notes, and the applicant's own voluntary guilty plea, buttress this presumption.

The applicant also alleges he suffers from PTSD. We do not opine on mental health claims; however, we note for the Board the psychological advisor has already found insufficient evidence

to support clemency on the basis of a mental health condition. We further note 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 admitted to seeking out, purchasing, and using cocaine. 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.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 11 Apr 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 USC § 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 the applicant was diagnosed with PTSD during or after military service. Additionally, Air Force systems contradict the applicant's contention regarding a lack of positive urinalysis results for his cocaine use. The Board relies on the presumption of regularity to conclude a urinalysis was properly conducted. Liberal consideration was applied; however, the applicant's mental health condition does 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, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-03325 in Executive Session on 17 Jul 24:

Work-Product

Panel Chair
Panel Member
Panel Member

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

Exhibit A: Application, DD Form 149, dated 25 Aug 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 10 Jan 24.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Feb 24.

Exhibit E: Advisory Opinion, AF/JAJI, dated 1 Apr 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 11 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.

8/6/2024

Work-Product