UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: BC-2023-03463

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His Article 15, dated 26 Apr 22, be removed from his senior noncommissioned officer (SNCO) selection record.

2. His grade of technical sergeant (E-6) with date of rank (DOR) of 1 Jul 20 be reinstated.

3. His referral enlisted performance report (EPR) for the reporting period ending 31 Jan 23 be replaced with a non-referral EPR.

APPLICANT'S CONTENTIONS

The administrative discharge board found he did not disobey a lawful order under Article 92, Uniform Code of Military Justice (UCMJ). However, his commander found the opposite. In view of the administrative discharge board's findings, his area defense counselor (ADC) requested his commander set aside the Article 15. However, his commander responded with an unfair and unrealistic standard stating there was not 100 percent certainty he accidentally ingested hemp or hemp derived products. The discharge board had already determined with an abundance of information based on the testimony of two renowned toxicologists and several personal testimonies that he had not knowingly ingested hemp or hemp derived products. His commander's decision was arbitrary and capricious. His decision failed to consider the facts and instead was based on an unfair standard of 100 percent certainty.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 22 Mar 22, the applicant was directed to provide a urine specimen for a random urinalysis inspection.

The security forces report of investigation (ROI), dated 22 Apr 22, includes a memorandum from the drug testing program administrative manager (DTPAM), dated 7 Apr 22, which states the applicant's specimen collected on 22 Mar 22 was positive for tetrahydrocannabinol (THC) 8 (active ingredient in marijuana) at 1,466 nanograms/milliliter (ng/ml) and THC 9 (marijuana) at 21 ng/ml. The Air Force cutoff for positive reporting is 15 ng/ml.

AF Form 3070(b), *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt),* dated 26 Apr 22, reflects the applicant received an Article 15. Specifically, between 22 Feb 22 and 22 Mar 22, he failed to obey a lawful order by wrongfully ingesting a product containing or derived from hemp, in violation of Article 92, UCMJ. Punishment included a reduction to the grade of E-5, with new DOR of 5 May 22.

In his Article 15 appeal dated 29 Apr 22, the applicant stated he was aware the positive urinalysis indicated the use of THC. However, he did not intentionally consume any products with THC or cannabidiol (CBD) and the most likely cause was due to accidental ingestion. He believed the positive urinalysis was caused by a vape product he purchased, which to his knowledge did not appear to have THC and was a nicotine product. However, due to the novelty and lack of regulation, it may have been difficult for him to discern whether the vape products contained THC. He did not smoke or ingest marijuana. He fully cooperated with the investigation, waived his rights, consented to searches and even gave the vape pen he had at the moment to security forces. To prevent future issues, he quit vaping and nicotine altogether. The applicant asked his commander to consider his duty history and performance. The applicant listed his multiple deployments, awards, and medals, to include his selection as the major command (MAJCOM) crew chief of the year for 2017. He apologized to his entire leadership team, asked for leniency, and submitted numerous character witness statements. The applicant's appeal was denied, and it was determined the Article 15 would be filed in his SNCO selection record and unfavorable information file (UIF). The military personnel data system (MilPDS) reflects the applicant currently has a UIF.

The applicant received a referral EPR for the reporting period 1 Feb 22 through 31 Jan 23. The referral EPR states he exercised poor judgment, received an Article 15 for a positive urinalysis and he did not meet standards.

An administrative discharge board convened 27 to 28 Feb 23 to determine if the applicant should be retained or discharged. The discharge board found the applicant did not, between 22 Feb 22 and 22 Mar 22, fail to obey a lawful general regulation. The board found the allegation did not form a basis for discharge under DAFI 36-3211, *Military Separations*, paragraph 7.43. Since it had not been shown by a preponderance of the evidence that a drug offense was committed by the applicant, the board recommended he be retained in the Air Force.

In an email dated 6 Apr 23, the applicant's squadron commander (SQ/CC) informed the applicant's area defense counsel (ADC) that while it was a tough decision, he denied the request that the Article 15 be set aside. He stated there was nothing he saw that could 100 percent show it was an accidental ingestion. He also found the process of purchasing vapes from stores that sell CBD and taking opened packages from employees behind the counter without requesting to read the label concerning.

On 19 Jun 23, the applicant filed a formal Article 138, UCMJ complaint to the numbered air force commander (NAF/CC) alleging his SQ/CC committed a wrong against him. The applicant stated his SQ/CC's mission was to seek 100 percent certainty in deciding to set aside his Article 15. He noted the administrative discharge board determined he committed no wrongdoing and did not knowingly violate Article 92, UCMJ by wrongfully ingesting a product containing or derived from hemp. His SQ/CC is using a 100 percent certainty standard when the legal standard is "preponderance of evidence." The toxicologist's testimony made it clear there were no scientific studies on the effects of vaped Delta-8 THC from tobacco vape. The board took all the facts into consideration and determined he did no wrong. The applicant requested his Article 15 be set aside and his grade of E-6 be reinstated.

On 10 Jul 23, the NAF/CC reviewed the applicant's formal complaint under Article 138, UCMJ in accordance with AFI 51-505, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice.* The NAF/CC determined the applicant raised a matter outside the scope of Article 138 and dismissed his complaint without a decision. Per AFI 51-505, matters related to nonjudicial punishment (NJP) were not eligible for Article 138 review.

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

AIR FORCE EVALUATION

AF/JAJI recommends denial. The entire NJP record indicates all procedural requirements were complied with and the applicant's rights preserved. The NJP was reviewed by the servicing legal office and found to be legally sufficient. The record reflects the applicant's commander acted within the scope of his authority concerning the punishment imposed. There is no material error or injustice.

On 26 Apr 22, the applicant's SQ/CC offered the applicant an Article 15 for one violation of failure to obey a lawful general regulation by wrongfully ingesting a product containing or derived from hemp and one violation of Article 112a for wrongfully using marijuana. The applicant denied using THC 8 or 9 and speculated it may have been an accidental ingestion from a vape product containing THC, given he regularly vaped nicotine. On 5 May 22, the SQ/CC found the applicant violated Article 92 (failure to obey); however, he had not committed the offense alleged in violation of Article 112a (wrongful use). The applicant's appeal was denied by the successor SQ/CC and the appellate authority. The SQ/CC elected to file the NJP in the applicant's SNCO selection record and UIF.

The applicant was subsequently recommended for discharge per DAFI 36-3211 for drug abuse. An administrative discharge board convened 27 to 28 Feb 23. Contrary to the SQ/CC's findings in the NJP proceedings, the board found the applicant did not commit the offense of failure to obey a lawful general regulation by wrongfully ingesting a product containing or derived from hemp. Therefore, they found no basis for discharge and recommended retention. Following, the discharge board's decision, the applicant's ADC engaged with his SQ/CC to inquire whether he would consider setting aside the NJP punishment. On 6 Apr 23, the SQ/CC notified the ADC he decided to let the NJP remain in place. He stated, "In the end, many people said great things about the applicant, and he seems like a great worker, but there was nothing that I saw that could 100 percent show that it was accidental, which made it a hard decision."

The applicant argues his commander acted arbitrarily and capriciously in denying setting aside his NJP because the administrative discharge board found he had not wrongfully ingested a product containing or derived from hemp, a finding contrary to his commander who held him to an unfair standard to prove his innocence to 100 percent certainty the ingestion was accidental. There is no requirement a commander must set aside punishment of an NJP when an administrative discharge board reaches a conclusion different from the commander. The discharge board's conclusion is not controlling precedent over a commander's discretion on whether to take set aside action. Additionally, the burden of proof is preponderance of the evidence in both the NJP and administrative discharge board proceedings, and reasonable minds can differ, as they did in this case.

Per DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, the applicant bears the burden of providing evidence in support of the allegations of an error or injustice. The applicant has offered no evidence of an error or injustice and AF/JAJI defers to the commander as

the factfinder exercising his discretionary authority in this matter. It is not within the scope of the AFBCMR to relitigate the underlying facts and circumstances. Nevertheless, in the context of correcting military records, an "unusually deferential" application of the "arbitrary or capricious" standard is applied. Deference to a commander's decision is not blind deference, as findings of fact can be evaluated for arbitrariness and capriciousness. However, under this deferential standard, AF/JAJI finds the applicant's commander did not act arbitrarily and capriciously and the applicant's claims are no more than a disagreement with his commander's decision. Secondly, commanders should not routinely set aside punishment, but should exercise this discretionary authority only in the rare and unusual case where a question concerning the guilt of the member arises or where the best interest of the Air Force is served by clearing the member's record. The applicant asserts his commander is holding him to an illegal 100 percent standard. However, his commander's statement is nothing more than a poor choice of words, incorrectly implying there is a burden of proof in the set aside actions. His commander's decision on the set aside action was consistent with the original findings in the NJP proceedings. Further, no new information or evidence came to light at the administrative discharge board. The only new information is that the board reached a conclusion different from the commander based on the same evidence. The commander's decision was within his discretion and there is no evidence of abuse of authority. Also, the NJP forum was the applicant's choice. He exercised his right to waive trial by court martial and elected NJP proceedings. Had he wished, he had the option to proceed to a court martial where the burden of proof is a much higher standard of beyond a reasonable doubt.

Regarding the applicant's referral EPR that followed from his NJP, proper procedural requirements were complied with and the applicant's rights preserved. In accordance with DAFI 36-2406, *Officer and Enlisted Evaluation Systems,* the referral EPR documented specific comments about the applicant's duty performance. The record reflects the applicant was afforded due process concerning the referral EPR and there was no material error or injustice.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 12 Dec 23 for comment (Exhibit D), and the applicant replied on 19 Dec 23. In his response, the applicant states the advisory states he only appealed the punishment. This is misleading as he had already appealed the entirety of the Article 15. His SQ/CC was relieved of duty over a weekend and the successor assumed command as the interim commander. This is a relevant issue as it would be unlikely for a new commander under the circumstances and in the limelight to overturn a prior decision. Further, he was not notified of the discharge board's decision until 18 Jul 23, two months after the Article 15 process.

The advisory opinion states that the burden of proof is preponderance of evidence in both the NJP and administrative discharge board proceedings. The discharge board concluded that based on the evidence he was not guilty of disobeying Article 92, UCMJ. If someone was to get arrested and it was later determined the individual was not guilty of the crimes, then the individual would not continue to receive punishment. This is not the case here.

The advisory opinion also states that his commander merely used a poor choice of words when stating his standard of proof. This was not in casual conversation but in an official email and was indeed fact. Setting the fact aside and calling it a "poor choice of words" is essentially wiping it off as if this was not the standard set forth for him to prove. He was to prove without a shred of doubt that he did not knowingly disobey a lawful order.

The advisory opinion states his commander and the discharge board had access to the same evidence. This is also inaccurate as the board members had additional evidence the commander did not have. The testimonies of two toxicologists and the four testimonies in his behalf were not recorded and therefore not available for the commander's review.

With respect to how he opted for the NJP rather than the court martial route, as a father and a husband he took the route with the least possible impact to his family. Knowing he is innocent is one thing, proving it to others is another matter.

The applicant's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was timely filed.

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 and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board recognizes the administrative discharge board and the applicant's SQ/CC reached differing conclusions. However, as pointed out by AF/JAJI, the discharge board's conclusion is not binding over a commander's discretion on whether or not to set aside NJP. Further, based on the evidence, it appears all procedural requirements in the administration of the NJP were followed, it was found legally sufficient and was within the commander's authority and discretion. The Board also notes military commanders are presumed to act lawfully and in good faith and entitled to substantial deference in the governance of its affairs. In this case, the applicant has not sustained his burden of proof that his commander acted arbitrarily or capriciously in the decision to deny the applicant's request his NJP be set aside based on the findings and recommendations of the administrative discharge board. Since the Board finds insufficient evidence to warrant removal of the Article 15, the Board finds the applicant's referral EPR for the period ending 31 Jan 23 is correct as reflected and finds insufficient evidence to replace the EPR with a non-referral report. Therefore, the Board recommends against correcting the applicant's records.

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-2023-03463 in Executive Session on 8 Feb 24:

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

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

Exhibit A: Application, DD Form 149, w/atchs, dated 19 Oct 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AF/JAJI, dated 6 Dec 23.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Dec 23.
Exhibit E: Applicant's Response, w/atchs, dated 19 Dec 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.

6/21/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF