

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03736

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record be amended to:

- a. Upgrade his general (under honorable conditions) discharge to an honorable discharge.
- b. Change his Narrative Reason for Separation from "Misconduct (Drug Abuse)" to "Secretarial Authority" with a corresponding Separation Code.
- c. Change his Reentry Code from "2X" [Airman non-selected for reenlistment] to "1" [1-series, Applicants Eligible for Immediate Reenlistment].

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, provided a summary of the applicant's military service. Per counsel, the applicant received a Traumatic Brain Injury (TBI) during a softball game when he was struck with the ball, broke the cartilage in his nose, and went unconscious. This was the applicant's second TBI in his life, the first occurred two years before his service when the applicant was hit with a baseball bat. After the softball game, the applicant suffered from chronic migraines that went unexplained until his TBIs were diagnosed in 2016.

In 1981, the applicant was notified his father developed cancer, developed while his father was service in the Air Force repairing radar that was accidentally activated, exposing him to high amounts of radiation. On 29 Aug 81, the applicant was arrested by the [Work-Product] police and charged with wrongful use and possession of marijuana. He subsequently received a Letter of Reprimand (LOR) and was placed on the Control Roster for 120 days. However, the applicant's performance report reflected only that his off-duty behavior did not always reflect a good image, but that behavior was all that needed improvement for the applicant to be an outstanding performer. Counsel provided excerpts from the applicant's performance report for this period.

On 12 Feb 82, the applicant received his third TBI and cervical spine damage when he was attacked and hit in the head with a chair as he walked into a [Work-Prod...] restaurant in full uniform three months after the United States shot down their fighters. After a 12-hour memory lapse, the applicant found himself in the hospital with a concussion and six stitches.

According to counsel, what ultimately led to the applicant's discharge proceedings was the receipt of an Article 15 on 15 Jun 82, for wrongfully transferring marijuana on 25 Mar 82 and 27 Mar 82. On 25 Mar 82, the applicant was reportedly observed smoking marijuana on base. On the same day, the applicant gave [another airman] a piece of hashish in exchange for a mobility bag and [the other airman] then received approval from command to give the applicant the bag. On the following day, [the other airman] inquired about purchasing a plate (500 grams) of hashish which the applicant said he could obtain for her for 1500 DM. [The other airman] obtained the money, gave it to the applicant in his quarters, and he allowed [the other airman] to ride along to make the purchase. On the drive, [the other airman] observed the applicant smoking marijuana cigarettes. Unsuccessful in obtaining the full amount of hashish, the

applicant gave [the other airman] only 2.45 grams of hashish and offered to keep trying over the weekend.

On 29 Mar 82, the applicant was advised to take a urinalysis test which did not result in a positive result for tetrahydrocannabinol (THC) despite [the other airman's] report of the applicant smoking the day before. Investigators believed the applicant received urine from [a noncommissioned officer (NCO)], but no evidence support the claim and both [the NCO] and the applicant denied it. On 30 Mar 82, [the other airman] gave the applicant a mobility bag. As of 28 Apr 82, the investigative report stated the applicant was never successful in finding a large quantity of hashish.

Per counsel, on 10 May 82, the applicant was interviewed, advised of his rights, and the applicant allegedly admitted to using hashish twice a week since arriving in **Work-Product**. The applicant did not consent to a search of his quarters; however, he did give back the mobility bag he received. On 17 May 82, the applicant was demoted to airman first class, forfeited pay for two months, and was denied reenlistment. On 23 Jun 82, discharge proceedings were initiated with recommendation for an Other Than Honorable discharge. On 29 Jun 82, the applicant submitted a conditional waiver where he agreed to waive his rights to a board hearing in exchange for a general discharge; however, the waiver was denied. The applicant's command then accepted an unconditional waiver which added a correction to the applicant's prior statement that he used hashish twice a week while in **Work-Product** by specifying he ceased use after his Aug 81 arrest. The applicant's command ultimately accepted his unconditional waiver and deemed a general discharge without probation and rehabilitation was more appropriate given the applicant's multiple letters of appreciation, his near completion of his six-year enlistment, and overall high airman performance report (APR) ratings.

Counsel further contended the applicant's chain of command made an error in discretion by misclassifying the extent of his drug use. The applicant's command classified him as a habitual drug user prior to the investigation and subsequently subjected the applicant to a greater level of scrutiny and a harsher characterization of discharge. The applicant was classified as a habitual drug user following two events: his Sep 81 arrest for possession of marijuana, and the observational report of the applicant smoking marijuana on 25 Mar 82. While on the Control Roster for 120 days for the arrest, the applicant had no incidents of punishment and gave his command no further reason to believe he was a perpetual drug user. When the applicant was then observed to allegedly be smoking marijuana on base, he was never interviewed, and no physical evidence of marijuana substantiated the claim. Here, rather than the applicant's command counseling him regarding the claim of drug use against him, his command used the opportunity to classify the applicant as a continuing drug user. The applicant was subsequently thrust into a heightened investigation that same day where his command likely directed [the other airman] to set up a controlled drug purchase. Counsel reiterated the details of the interaction between the applicant and [the other airman], adding [the other airman] reported to command the applicant gave her hashish in exchange for a supply bag and command then provided [the other airman] with money for a larger purchase of hashish. But for [the other airman's] participation in the investigation, the chain of command would not have had the evidence needed to prove the applicant wrongfully transferred drugs or that he was a drug user. Furthermore, and according to the applicant, [the other airman] indicated they would not provide a statement in a court-martial and the chain of command said due to minimal evidence they would administratively separate instead of attempting a court-martial with a higher evidentiary standard. The applicant's situation worsened when he refused to sign paperwork referencing his knowledge of female airmen who were "bi-sexual."

The applicant has been the victim of a material injustice because of his general discharge from the Air Force, which has been recognized by various courts. "Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge

stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community." *Sofranoff v. United States*, 165 Ct. Cl. 470 (Ct. Cl. 1964). The clear language of this decision shows the mentality of how a general discharge is viewed by the public outside of the military. Here, the applicant has been deprived of his honor and good name, which continues to cause him undue harm since his discharge from the Air Force. The applicant is repentant about his misconduct and has since demonstrated a dedication to living an honorable civilian life. Counsel provided a summary of the applicant's post-service achievements.

Finally, in a letter of support, the applicant's wife detailed the applicant's medical conditions, symptoms, and the effects on their lives. She concluded her letter by adding the applicant came from an Air Force family, he grew up aspiring to serve the Air Force, and to this day, the applicant remains proud of his service. Per counsel, the applicant's misconduct, along with his chain of command's failure, will rob him of the opportunity to be recognized as an honorable veteran upon his death. Given the applicant's excellent service record and civilian life, these consequences are intolerable to him and his family, which he now seeks to rectify.

In support of his request for a discharge upgrade, the applicant provides copies of his APRs, military kudos, numerous post-service certificates of achievement, his resume, his spouse's letter of support, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 15 Jun 82, according to AF Form 3070, *Notification of Intent to Impose Nonjudicial Punishment*, the applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for violation of Article 134, UCMJ, for the following offense:

- [The applicant] did, at Lindsey Air Station, [Work-Product], on or about 25 Mar 82, wrongfully transfer marijuana; [the applicant] did, at [Work-Product], [Work-Product], on or about 27 Mar 82, wrongfully transfer marijuana.

The applicant was reduced to the grade of airman first class (E-3), with a new date of rank of 15 Jun 82, and ordered to forfeit \$366.00 per month for two months.

On 23 Jun 82, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Manual (AFM) 39-12, *Separation for Unsuitability, Unfitness, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program*, Chapter 2, Section B, paragraph 2-15c, for drug abuse. The specific reasons for the action were:

On or about 29 Aug 81, [the applicant] was apprehended by [Work-Product] Police Officers and charged with wrongful use and possession of marijuana. For this offense, he received an LOR, dated 28 Sep 81. As a result of this offense, he was placed on the control roster on 28 Sep 81 for 120 days. [The applicant] was subject of an Air Force Office of Special Investigations Report of Investigation, dated 26 May 82. As a result of the information contained in this report, [the applicant] was administered Article 15 punishment on 15 Jun 82 for the wrongful transfer of hashish on 25 Mar 82 and 27 Mar 82. This report further substantiated [the applicant] had used hashish at least twice each week since his arrival at this station on 28 May 80. [The applicant's] continued use of cannabis is not conducive for continued military service. His actions indicate he has not, and will, not refrain from repeated use of marijuana.

On 29 Jun 82, according to an applicant memorandum, Subject: Discharge Under AFM 39-12, Chapter 2, Section B, the applicant offered a conditional waiver of his rights associated with an administrative discharge board hearing contingent upon receipt of a general discharge.

On 19 Jul 82, the XX ABG Staff Judge Advocate found the discharge action legally sufficient.

On 21 Jul 82, according to a XX ABG/CC memorandum, Subject: Rejection of Conditional Waiver, the XX ABG/CC rejected the applicant's conditional waiver based on his level and length of involvement with drugs.

On 4 Nov 82, according to an applicant memorandum, Subject: Discharge Under AFM 39-12, Chapter 2, Section B, the applicant waived his right to a hearing before an administrative board and submitted statements on his own behalf.

On 5 Nov 82, according to an XX EIG/CC memorandum, Subject: Administrative Discharge of [applicant], the applicant's commander recommended the applicant be furnished a general discharge by the most expeditious means.

On 8 Nov 82, according to a XX ABG/JA memorandum, Subject: Unconditional Waiver, AFM 39-12, [applicant], the Deputy Staff Judge Advocate concurred with the recommendation for a general discharge. On this same date, the XX ABG/CC concurred with the legal review and recommendation.

On 17 Nov 82, according to a XX AF/JAV memorandum, Subject: Legal Review of AFM 39-12 Separation Action, [applicant], the administrative discharge proceedings were found to be legally sufficient.

On 4 Dec 82, the discharge authority accepted the applicant's unconditional waiver and directed the applicant be discharged pursuant to the provisions of AFM 39-12, Chapter 2, Section B, paragraph 2-15c, with a general service characterization. Probation and rehabilitation were considered, but not deemed appropriate.

On 14 Dec 82, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct – Drug Abuse" with separation code of HKK [Misconduct – Drug Abuse] and reenlistment code of 2X. The applicant was credited with 5 years, 5 months, and 24 days of total active service.

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

POST-SERVICE INFORMATION

On 4 Apr 84, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, 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 replied on 29 Apr 84 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

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 4 Apr 24, the Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

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 27 Jun 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

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 insufficient evidence to support the applicant's request for an upgrade of his discharge from a psychological perspective.

There is insufficient evidence to suggest, while the applicant had head injuries during his service, he suffered any cognitive impairment as a result of this. During his separation examination in 1982, the applicant denied any loss of memory or amnesia or having any periods of a loss of consciousness. His examiner noted the applicant did not have any psychiatric or neurologic symptoms and reported these as "normal" on his medical examination. Additionally, the applicant's performance evaluations during his military service all demonstrate an above-average to exemplary performance. This further supports the applicant did not have any cognitive impairments during his military service.

The applicant was examined on 7 Jan 13 (Compensation & Pension, Initial Evaluation of Residuals of Traumatic Brain Injury), 34 years after his military service. Significantly, the examiner noted "No significant cognitive deficits from TBI." It appears the applicant was not service-connected for TBI at this time but was service-connected three years later in 2016 for Traumatic Brain Disease at 10 percent.

This Psychological Advisor concludes the applicant did not have any mental health condition, including TBI, during his service that would excuse or mitigate his misconduct of drug usage or for transferring drugs on two separate occasions. Even if the applicant had a TBI during his time in service, there is no indication it caused any cognitive impairment. It would, therefore, not be a mitigating factor for his drug usage or for transferring drugs on two occasions.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge, and insufficient evidence has been presented to support the applicant's request. Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant check-marked TBI on his application. The applicant, through counsel, contends he had a TBI during his time in service.

2. Did the condition exist, or experience occur, during military service?
There is insufficient evidence to suggest, while the applicant had head injuries during his service, he suffered any cognitive impairment as a result of this. During his separation examination in 1982, the applicant denied any loss of memory or amnesia or having any periods of a loss of consciousness. His examiner noted the applicant did not have any psychiatric or neurologic symptoms and noted these as "normal" on his medical examination. Additionally, the applicant's performance evaluations during his military service all demonstrate an above-average to exemplary performance. This further supports the applicant did not have any cognitive

impairments during his military service. The applicant was examined on 7 Jan 13 (Compensation & Pension, Initial Evaluation of Residuals of Traumatic Brain Injury), 34 years after his military service. Significantly, the examiner noted “No significant cognitive deficits from TBI.” It appears the applicant was not service-connected for TBI at this time but was service-connected 3 years later in 2016 for Traumatic Brain Disease at 10 percent.

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

This Psychological Advisor concludes the applicant did not have any mental health condition, including TBI, during his service that would excuse or mitigate his misconduct of drug usage or for transferring drugs on two separate occasions. Even if the applicant had a TBI during his time in service, there is no indication it caused any cognitive impairment. It would, therefore, not be a mitigating factor for his drug usage or for transferring drugs on two occasions.

4. Does the condition or experience outweigh the discharge?

Since the applicant’s mental health condition does not excuse or mitigate his discharge, the applicant’s condition also does not outweigh the original discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Aug 24 for comment (Exhibit G) and the applicant replied on 1 Nov 24. In his response, counsel contends the advisory opinion is incorrect in its findings. The applicant submitted post-service mental health records that establish a nexus between his military service and his diagnosed TBI.

As established in the Kurta memorandum, the applicant is entitled to a lenient review because of his mental health condition that manifested during his military service. The Kurta memorandum also establishes certain criteria that can be used as evidence of an existing mental health condition during military service when there is no formal diagnosed condition. Evidence of a mental health condition can include deterioration in work performance, inability of an individual to conform their behavior to the expectations of a military environment, and changes in behavior. Here, the applicant was struggling with his ability to conform to military standards because of his undiagnosed and untreated TBI. The applicant’s executive decision-making skills were significantly impaired at this time, which certainly mitigates his culpability regarding the misconduct. The applicant continues to suffer from his service-connected TBI, as made evident by the personal statement drafted for this Board. Additionally, the applicant now has a medical marijuana card to treat his TBI and its myriad symptoms.

The applicant’s complete response is at Exhibit H.

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 Title 10, United States Code, Section 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, to include the applicant’s rebuttal, 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 finds a preponderance of the evidence does not substantiate

the applicant's contentions. The Board finds the applicant did not have any mental health condition, including TBI, during his service that would excuse or mitigate his misconduct of drug usage or for transferring drugs on two separate occasions. There is insufficient evidence to suggest, while the applicant had head injuries during his service, he suffered any cognitive impairment as a result of these injuries. During his separation examination in 1982, the applicant denied any loss of memory or amnesia or having any periods of a loss of consciousness. Further, counsel's contention the applicant's executive decision-making skills were significantly impaired at the time of misconduct due to TBI is incongruent with counsel's contentions regarding the applicant's excellent service record and APRs. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

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. The applicant's administrative discharge underwent multiple legal reviews, and the applicant was afforded due process. In the interest of justice, the Board considered upgrading the discharge based on clemency/fundamental fairness; however, given the evidence presented, the seriousness of the misconduct, and the premeditated nature of his misconduct in obtaining and negotiating the transfer of hashish, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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-2023-03736 in Executive Session on 15 Jan 25:

, 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 8 Jun 23.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 4 Apr 24.
Exhibit D: FBI Report, dated, 27 Jul 21.
Exhibit E: Letter, SAF/MRBC, w/atchs (Liberal Considerations Guidance), dated 27 Jun 24.
Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 22 Aug 24.
Exhibit G: Notification of Advisory, SAF/MRBC to Counsel, dated 26 Aug 24.
Exhibit H: Counsel's Response, w/atchs, dated 1 Nov 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.

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