

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2003-00940

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her official military personnel records be amended to:

- a. Set aside the findings of her administrative separation board.
- b. Upgrade her discharge from Under Other Than Honorable Conditions (UOTHC) to Honorable or General (Under Honorable Conditions).

RESUME OF THE CASE

The applicant is a former Air Force Reserve technical sergeant (E-6).

On 1 Aug 06, the Board considered and denied her request to have her administrative discharge action set aside, that she be reinstated in the Air Force Reserve to allow her the opportunity to retire with 20 years' service, to include back pay and allowances, or as an alternative, she be credited with 20 years' service and transferred to the Retired Reserve. The Board found there was insufficient relevant evidence presented to demonstrate the existence of an error or injustice. The Board adopted the rationale and recommendation of AFRC/JA in reference to the applicant's contentions the discharge board was improperly instructed regarding burden of proof, the elements of wrongful use of marijuana, and the definitions necessary to properly determine those elements, as well as her contention there was insufficient evidence to prove she wrongfully and knowingly used marijuana. Further, the Board concurred with the AFRC/DPZ advisory opinion regarding issuance of the DD Form 214, *Certificate of Release or Discharge from Active Duty*, and the applicant's lack of eligibility.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the Air Force Board for Correction of Military Records (AFBCMR) Letter and Record of Proceedings at Exhibit H.

On 1 Dec 22, the applicant, via counsel, requested reconsideration of her request to set aside the findings of her administrative separation board. Additionally, she requested her service characterization be upgraded from UOTHC to Honorable, or General (Under Honorable Conditions). In support of her request, counsel again presented a detailed chronology of the applicant's military service, alleging her military career was cut short by her wrongful involuntary separation. Further, counsel recounted contentions from the applicant's original petition to the Board regarding procedural defects in her administrative separation board hearing, additionally alleging flaws in the forensic testing procedures at the Air Force Drug Testing Laboratory rendered the evidence presented to the separation board insufficient to prove wrongful and knowing use of marijuana. In support of clemency, counsel stated in the 15 years since Aug 06, the applicant has proven herself to be a valuable and devoted member of her community. In Dec 20, she retired as a Network Systems Engineer after nearly 32 years with a local electric company. Throughout her long career with the company, she received numerous awards and bonuses in recognition of her tireless efforts to better the company and community. During the height of the COVID pandemic, the applicant worked extra hours to help residents

understand and navigate the transition to teleworking. Prior to the pandemic, she consistently volunteered her time to help others, including senior citizens and breast cancer awareness events. In 2016, the applicant received a certificate of appreciation from a [State] House Representative in recognition of her lengthy military service.

In the request for reconsideration, counsel again contends a single positive urinalysis for the presence of tetrahydrocannabinol was not sufficient to prove wrongful use of marijuana, and the applicant adamantly denies knowingly ingesting marijuana. Counsel further contends the applicant would have met the criteria for retention under Air Force regulations, but her military defense counsel never brought it up. He references Air Force Instruction (AFI) 36-3209, *Separation and Retirement Procedures for Air National Guard (ANG) and Air Force Reserve Members*:

4.14.4. The policy for retention criteria and consideration for drug abuse cases:

4.14.4.1. A member found to have abused drugs will be discharged unless the member meets all seven of the following criteria:

4.14.4.1.1. Drug abuse is a departure from the member's usual and customary behavior, and

4.14.4.1.2. Drug abuse occurred as a result of drug experimentation (a drug experimenter is defined as one who has illegally or improperly used a drug for reasons of curiosity, peer pressure, or other similar reasons), and

4.14.4.1.3. Drug abuse does not involve recurring incidents, other than drug experimentation as defined above, and

4.14.4.1.4. The member does not desire to engage in or intend to engage in drug abuse in the future, and

4.14.4.1.5. Drug abuse under all circumstances is not likely to recur, and

4.14.4.1.6. Under the particular circumstances of the case, the member's continued presence in the Air Force Reserve or ANG is consistent with the interest of the Air Force or ANG in maintaining proper discipline, good order, leadership, and morale (officers and noncommissioned officers have special responsibilities by virtue of their status; fulfill an integral role in maintaining discipline; and therefore, must exhibit high standards of personal integrity, loyalty, dedication, devotion to duty and leadership), and

4.14.4.1.7. Drug abuse did not involve drug distribution. For the purpose of this paragraph, drug distribution means the delivery to the possession of another. Distribution does not occur with the transfer of one or more drugs from one person to another while such persons are engaged in the mutual use of drugs, except that individuals who obtain or arrange for obtaining one or more drugs used by others are involved in distribution. "Delivery" means the actual, constructive, or attempted transfer of one or more drugs, whether or not there exists an agency relationship.

Counsel also presents the Under Secretary of Defense Robert Wilkie's Memorandum, issued 25 Jul 18, *Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations*, paragraph 6, emphasizing the effects of change in policy and how the relative severity of some misconduct can change over time, for example, marijuana use.

Per counsel, real doubt exists concerning the applicant's test results. While in her prior application the Board did not believe material error or injustice occurred, the passage of time and new information not previously considered concerning issues that existed at the Brooks Drug Testing Laboratory in and around the time of the applicant's urinalysis should cause the Board to revisit this matter favorably. In 1999, it was discovered a manager at the Brooks lab was not following proper procedures concerning the processing of urinalyses. This ultimately led to his removal from the lab. In light of this and all other evidence, or lack thereof, a real doubt exists

whether a UOTHC discharge was warranted. Today in 2022, given how marijuana use is now perceived in society, at least an upgrade to the service characterization is warranted.

Further, the applicant met the criteria for retention pursuant to AFI 36-3209, yet this argument was never raised before the administrative separation board for consideration. The burden of proof that retention is warranted pursuant to this guidance rests with the servicemember, and the failure of her military defense counsel to mention the retention policy constitutes a gross injustice. It should not be held against the applicant that her assigned military legal counsel did not identify and raise the retention policy on her behalf. If appropriately raised, the administrative separation board would have easily been able to conclude the applicant met all seven criteria for retention by a preponderance of the evidence. Multiple witnesses testified any marijuana use would have been a vast departure from her usual behavior. In addition, based on the evidence presented, a single use of marijuana rationally implies experimentation. The applicant testified before her administrative separation board, through her unsworn statement, that she had no intention of using marijuana. Her positive urinalysis was undoubtedly a one-time instance. The applicant requested a re-test, and had she been granted this request, the administrative separation board could have had tangible evidence of singular use. Once the administrative separation board concluded she wrongfully used marijuana based on the positive urinalysis, it should have been an easy decision to retain her nonetheless, pursuant to Air Force regulations. However, the board members were never made aware of the retention policy, and as a result, the applicant was involuntarily discharged with the least favorable characterization.

Finally, counsel contends the applicant is the type of veteran the Wilkie Memo intends to provide relief. After consideration of the various factors enumerated with respect to the applicant's circumstances, the only reasonable conclusion to be drawn is that relief is warranted on the bases of equity and injustice. A servicemember under the same circumstances today would undoubtedly receive a more favorable outcome than the applicant received almost 22 years ago. As the Wilkie Memo recognizes, while marijuana is still unlawful in the military, it is viewed "as less severe today than it was decades ago." Because of this change in attitude towards marijuana, servicemembers with a single use of marijuana today are regularly retained under the retention criteria and merely receive administrative punishments with much less severe consequences, including letters of reprimand or nonjudicial punishment; they regularly avoid involuntary separation. Servicemembers involuntarily separated on the basis of marijuana use at present are far more likely to receive an Honorable or General (Under Honorable Conditions) discharge and only the most egregious cases involving repeated use or distribution, or those with other misconduct, would receive a UOTHC discharge. Counsel provides an example from his personal experience in support of this contention. Even if the Board is unwilling to disturb the administrative separation board's conclusion, that single use should not bar the applicant from receiving an honorable discharge characterization under the Wilkie Memo.

Counsel concludes the applicant's post-service activities are evidence of her admirable character which exemplifies why relief should be granted on the basis of equity, an injustice, and/or clemency grounds, especially in light of the Wilkie Memo. The stigma of having a UOTHC discharge weighs heavily on the applicant to this day.

In support of her request for reconsideration, the applicant provides a certificate of appreciation from the House of Representatives of [State] for her military service and a copy of an online article from the *San Antonio Express*, [Brooks drug lab under fire; Manager's removal clouds test results](#), dated 6 May 00.

The applicant's complete submission is at Exhibit I.

POST-SERVICE INFORMATION

On 23 Feb 24, the Board sent the applicant a request for post-service information and advised the applicant she was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not she 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 K). The applicant replied on 22 Mar 24 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 L.

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 23 Feb 24, Board staff provided the applicant a copy of the clemency guidance (Exhibit K).

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.

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 has presented evidence sufficient to demonstrate an injustice regarding part, but not all, of her request. Counsel's contention that the applicant should have been retained under the provisions of AFI 36-3209 is without merit as the applicant did not meet all seven of the required criteria; per counsel, she adamantly denied knowingly ingesting marijuana which is in conflict with the criteria found in paragraph 4.14.4.1.2. where drug abuse occurred as a result of experimentation. Additionally, despite allegations regarding the Air Force drug testing laboratory, no evidence was presented to show the applicant's urinalysis test was erroneous or otherwise defective. However, while the Board finds no error in the previous Board's findings, the administrative discharge board, or the original discharge process, the Board recommends partial relief based on clemency. In particular, in accordance with the Wilkie Memo, paragraph 6g, the relative severity of some misconduct changes over time, and the memo utilizes marijuana use as an example. While it is still unlawful in the military, it is now legal under state law in some states and may be viewed in the context of mitigating evidence, as less severe today than it was at the time of the applicant's discharge. Finally, the applicant's FBI report reflects no criminal history post-discharge. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board finds no basis to recommend granting that portion of the applicant's request. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 11 Jan 00, she 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-2003-00940 in Executive Session on 23 May 24 and 30 May 24:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 15 Aug 06.
- Exhibit I: Application, DD Form 149, w/atchs, dated 1 Dec 22.
- Exhibit J: Documentary Evidence, including relevant excerpts from official records.
- Exhibit K: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 23 Feb 24.
- Exhibit L: FBI Report, dated, 22 Mar 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.

X

Board Operations Manager, AFBCMR