



[REDACTED]

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

[REDACTED]

DOCKET NUMBER: BC-2023-02172

COUNSEL: [REDACTED]

HEARING REQUESTED: YES

APPLICANT’S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His record be corrected to reflect he transferred to the Retired Reserve on 2 Feb 00.
3. His narrative reason for separation be changed to “Secretarial Authority” or “Transferred to the Reserve Retired List.”

APPLICANT’S CONTENTIONS

The applicant, through counsel, contends although the applicant now receives retired pay because he earned 20 years of satisfactory service in the Air Force and Air Force Reserve (AFR), the “bookend” of his career remains a general (under honorable conditions) discharge and his military identification cards shows him as a “former member” and not as an AFR retiree.

No one was more flabbergasted by his positive urinalysis report than the applicant as he had never previously tested positive on a random drug test either the AFR or the Atlanta Fire Department (AFD). He was not and never had been a drug user. Although he did not receive any adverse action, i.e. Uniform Code of Military Justice (UCMJ) action, his commander recommended him for an administrative discharge. He offered to retire in lieu of discharge and both his squadron and wing commanders concurred with his request. However, the Secretary of the Air Force (SecAF) denied his request and a discharge board was convened. The government’s case for discharge rested on the urinalysis documents, the drug testing results, and testimony from an expert witness, Dr M, from the Air Force Drug Testing Laboratory.

He is a victim of unknowing ingestion. After the initial shock of the positive test results, he began to suspect that the herbal supplements he had been using for severe sinus issues might have had something to do with the test result. He was using herbal supplements and homeopathic vitamins. These products were called “SN-X” and “Nature’s Chi.” In his defense, Doctor [REDACTED], a forensic toxicologist testified that the herbal supplements contained Ma Huang, which is a natural source of ephedra and described a federal investigation that uncovered Ma Huang tea contaminated with Valium making the point that herbal supplements carry the risk of contamination and may be compromised even though they are legal. Further, his counsel offered a letter from a research toxicologist, Doctor [REDACTED], who shared his perspective about ephedrine’s effect on urinalysis results stating in his experience individuals whose drug test specimens contained a lot of ephedrine often had traces of methamphetamine in their urine. However, the discharge board ignored this overwhelming evidence of unknowing ingestion and found by a preponderance of the evidence he

[REDACTED]

had wrongfully used methamphetamine and recommended his discharge with a less than honorable characterization, putting an end to his military career.

The presumption of regularity should not apply to his discharge board. He overcame this presumption when he proved by a preponderance of the evidence that an error or injustice occurred as in his case the evidence makes it more likely than not that he suffered an error or injustice at his discharge board. This evidence concerns the credibility of the government's sole witness, forensic toxicologist, Doctor [REDACTED], as evidenced by the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Mahoney*. In that trial, after the court-martial ended, the trial defense discovered that a base staff judge advocate had written a letter, "criticizing Doctor [REDACTED]'s job performance and questioning the value of his continued employment." The defendant in that case, argued on appeal he was denied constitutional due process when the government failed to disclose the SJA's letter or the existence of the letter prior to the court-martial. On appeal the CAAF found for the defendant, reversing his conviction and sentence. The "Doctor [REDACTED] letter" is no small matter and the CAAF determined the letter to be material as it created a reasonable doubt probability and concluded "the letter's substantial impeachment value undermines confidence in the trial's outcome." The CAAF reached this conclusion regarding a court-martial that concluded a week prior to when his discharge board convened about the same individual who gave expert testimony in both proceedings. The Record of Board Proceedings give no indication that the parties (recorder or respondent's counsel) knew of the letter. A fair assumption is that they did not. Although a discharge board is an administrative proceeding and respondents do not have the same constitutional due process right attached to criminal cases, respondents are still entitled to a fair cross-examination of witnesses. If the military's highest court concluded that Doctor [REDACTED]'s letter held "substantial impeachment value" for the court-martial, then this Board should also conclude that the letter carried the same weight for a discharge board. The fact of the letter's existence is arguable influence on Doctor [REDACTED]'s testimony at the time of the applicant's discharge overcomes the presumption of regularity.

The most compelling case for correcting his record comes from his character, rehabilitation, and resiliency before and after his discharge. He fulfilled his childhood dream of becoming a firefighter and the Air Force gave him the opportunity to train as a first responder. Early in his military career his squadron commander recognized him for his valiant effort to save a heart patient's life. He brought this courage and compassion to the Air Force and the AFD. After his positive urinalysis test, he was tested by the AFD and never tested positive and continued to serve the AFD as a firefighter and paramedic until 2011 when he retired after 30 years of service. After retirement, he continued to serve his community as a medic and work for both a high school and a sheriff's department. This is ample evidence of his good character and rehabilitation. Even if the Board takes no issue with his discharge characterization, the Board now has evidence that he never used drugs before or after and has paid the price for his positive urinalysis in full.

If the above is insufficient to warrant relief, then the Board should determine whether the discharge board's recommended service characterization was just and proportionate to the allegation. First, the Board should weigh whether it was proved by a preponderance of the evidence that he wrongfully used methamphetamine given his unknowing ingestion defense and as the evidence supports that defense, the Board must correct the error and injustice and upgrade his discharge and grant him retiree status. Secondly, if the Board concludes the evidence was sufficient for an administrative discharge, it should ask if a general discharge was and remains fundamentally fair. According to AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, a general discharge (under honorable conditions) is appropriate when a service member's service has been honorable and faithful, but significant negative aspects of conduct or performance of duty outweigh the positive aspects of the member's military record. A single positive urinalysis is a negative event in his career and this singular occurrence does not

[REDACTED]

erase, negate, or overshadow his two decades of outstanding conduct and duty performance. Therefore, according to AFI 36-3209, and honorable discharge “is appropriate when the quality of the member’s service generally has met USAF standards of acceptable conduct and performance of duty. It may also be appropriate when a member’s service is otherwise so meritorious that any other characterization would be inappropriate.”

The guidance in the Wilkie memo is instructive when determining whether to grant relief on the basis of equity, injustice, or clemency. When the Board weighs each factor, the Board must conclude in favor of granting relief.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former AFR master sergeant (E-7).

On 28 Feb 77, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant entered the Regular Air Force (RegAF) and on 6 Feb 81 he was honorably discharged in the grade of staff sergeant. He was credited with 3 years, 11 months and 9 days of active service and the reason for separation was “volunteered to serve with the Air Force Reserve.”

On 1 May 81, Reserve Order Number [REDACTED] published 14 Dec 82, shows the applicant was assigned in the grade of staff sergeant to the Air Force Ready Reserve.

On 7 May 98, a “Notification of Eligibility for Retired Pay at Age 60 and audit of Retirement Points” was provided to the applicant notifying him that he was entitled to retired pay upon application at age 60.

On 5 Mar 99, according to DD FM 4/1, *Enlistment/Reenlistment Document Armed Forces of the United States*, the applicant was honorably discharged from the Air Force Reserve for the purpose of immediate reenlistment and on 6 Mar 99, the applicant reenlisted for a period of six years.

According to his Point Credit Summary, dated 21 Oct 00, he was credited with 22 years, 11 months, and 9 days of satisfactory service.

On 22 Sep 99, the wing Staff Judge Advocate found the discharge action legally sufficient.

On 23 Sep 99, the wing commander concurred and recommended to Air Force Reserve Command (AFRC) the discharge be effected at the earliest possible date.

On 27 Oct 99, the applicant was notified by AFRC of Initiation of Separation Action under AFI 36-3209 for misconduct, commission of a serious offense, drug abuse.

On 4 Nov 99, the applicant acknowledged receipt of *Memorandum of Notification of Initiation of Separation Action* and requested he be allowed to transfer to the Retired Reserve in lieu of administrative discharge for cause. Additionally, he requested a Discharge Board hearing if his retirement in lieu of request is denied.

On 13 Dec 99, the AFRC Staff Judge Advocate recommended the application for retirement in lieu of administrative discharge be forward by the Air Force Reserve Command Vice Commander (AFRC/CV) to SecAF with a disapprove recommendation.

[REDACTED]

On 2 Feb 00, SecAF disapproved the applicant's application to transfer to the Retired Reserve.

On 25 Apr 00, a Board of Officers convened at Robin AFB, GA pursuant to Special Order [REDACTED] Headquarters Air Force Reserve Command, dated 24 Apr 00. The Board found by a preponderance of the evidence the applicant did wrongfully use methamphetamine, but did not wrongfully use amphetamine, as evidenced by the positive test result of urine sample. As a result of its findings, the Board recommended the applicant be discharged from the AFR and issued a general (under honorable conditions) discharge.

On 26 Jul 00, the AFRC/CV approved the Board's finding's and recommendations and approved the applicant's discharge from the AFR with a general (under honorable conditions) discharge, in accordance AFI 36-3209, para 3.21.3.2, Misconduct, Commission of a Serious Offense, Drug Abuse.

On 10 Aug 00, according to Reserve Order [REDACTED] dated 26 Jul 00, the applicant was discharged from the AFR with a service characterization of general (under honorable conditions).

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

POST-SERVICE INFORMATION

On 19 Oct 23, 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 E). However, while the applicant did not reply to this request, in his submission, the applicant provided an FBI report dated 13 Dec 22 and a [REDACTED] Police Department criminal history report dated 21 Nov 22. According to the reports, the applicant has had no arrests since discharge. The applicant also provided a personal statement, character statements, certificates, commendations, and letters from his employers, and evidence of community service.

APPLICABLE AUTHORITY/GUIDANCE

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) 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 19 Oct 23, the Board staff provided the applicant a copy of the liberal consideration and clemency guidance (Exhibit E).

[REDACTED]

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

AF/JAJI recommends denying the requests. The applicant, through counsel, alleges as error or injustice a procedural irregularity occurred during his administrative discharge board hearing, in that he was deprived of the opportunity to challenge the credibility of the government's expert witness, considering CAAF's ruling in *U.S. v. Mahoney*. He further argues equitable relief is warranted based on his character, rehabilitation, and resiliency; and a discharge and service characterization of general (under honorable conditions) was a severe consequence under the circumstances, because he presented compelling evidence of unknowing ingestion.

On 11 Jul 99, a urine sample was collected from the applicant pursuant to a random urinalysis inspection. The sample tested positive for amphetamine at a level of 1814 ng/mL and for methamphetamine at a level of 5977 ng/mL. The Department of Defense cutoff, both then and now, for positive reporting of both substances is 500 ng/mL. His squadron commander recommended he be discharged pursuant to AFI 36-3209, paragraph 3.21.3.2, Misconduct, Commission of a Serious Offense, Drug Abuse, and on 27 Oct 99, the Chief, Military Personnel Operations, AFRC, sent him a Letter of Notification of Separation Action (LON).

He acknowledged the receipt of the LON and applied for transfer to the Retired Reserve in lieu of administrative discharge, but SecAF denied his request. On 25 Apr 00, an administrative discharge board convened, and the applicant was present and represented by counsel. The government called as an expert witness, Doctor [REDACTED], Chief, Forensic Sciences Branch of the Air Force Drug Testing Laboratory, who testified methamphetamine is metabolized to amphetamine in the body. The applicant's counsel had the opportunity to cross examine Doctor [REDACTED]. The applicant testified in his own behalf and presented an unknowing ingestion defense. He believed the herbal supplements he had been taking may have caused the positive urinalysis result. He also called his

[REDACTED]

own expert witness who testified the ingredients of the herbal supplements may contain ma haung, a natural source of ephedra, the structure of which is similar to ephedrine and amphetamine. He also testified to occasions where herbal supplements contained controlled substances but were not labeled accordingly.

The discharge board found, by a preponderance of the evidence, he had wrongfully used methamphetamine but not amphetamine. Additionally, the discharge board determined he did not meet any of the seven retention criteria and recommended he be discharged with a general service characterization. On 26 Jul 00, the AFRC/CV accepted the findings and recommendations of the discharge board and approved the applicant's discharge with a general (under honorable conditions) service characterization.

He asserts in his request, among other things, a procedural irregularity occurred at his discharge board. Specifically, he alleges he was denied full and fair opportunity to impeach Doctor [REDACTED] in light of the CAAF opinion in *U.S. v. Mahoney*, 58 MJ 346 (CAAF 2003). In that case, the appellant was convicted of drug use based on a single random urinalysis positive for cocaine. At trial, Doctor [REDACTED] gave expert testimony on behalf of the government. Id. After the conviction, trial defense counsel learned the government had failed to discover to the defense a letter written by a staff judge advocate critical of Doctor [REDACTED]'s job performance, due to apparent disdain for reliability of the government's drug testing program and questioning the value of his continued employment. Id. at 347-348. On appeal, CAAF reversed the case holding the prosecution's failure to provide the letter to the defense before the trial violated the appellant's constitutional right to due process of law (i.e. deprived the appellant the opportunity to challenge the credibility of Doctor [REDACTED]).

The CAAF opinion, *U.S. v. Mahoney*, cited as the basis of the applicant's procedural error argument, does not apply here. Case law is applicable to courts-martials, not administrative discharge boards. According to DAFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers*, paragraphs 5.1 and 5.1.1, an administrative board is an entirely different proceeding than a court-martial in that it is administrative in nature, not judicial; the burden of proof is preponderance of the evidence, not proof beyond a reasonable doubt; and the rules of evidence are relaxed, not strictly applied. Even if *U.S. v. Mahoney* did apply, the facts are distinguishable from the applicant's case in two significant ways. First, in *Mahoney*, the defense was able to establish the letter criticizing Doctor [REDACTED] was not provided in discovery. *U.S. v. Mahoney* at 347. With regard to the applicant's discharge board, he has provided no evidence the letter was not turned over in discovery to his counsel who represented him at the [discharge] Board. He can only point to a Record of Proceedings showing the letter was not an exhibit and not used by his counsel in the cross-examination of Doctor [REDACTED]. This in of itself is not proof the letter was not discovered to the applicant. Second, in *Mahoney*, the defense strategy was to attack procedural regularity and reliability of urinalysis. *U.S. v. Mahoney* at 347. In the applicant's discharge board, his defense was based on unknowing ingestion and his counsel's cross-examination of Doctor [REDACTED] focused on herbal supplements that he argued may have cause his positive urinalysis. The specific defense strategy in *Mahoney* appears to have been one of the persuading factors in the CAAF's decision, which was a significantly different defense strategy than the applicant's. Id at 349.

With regard to his argument, a general discharge was severe under the circumstances and unjust because he presented compelling evidence of unknowing ingestion, re-litigating the evidence presented at the discharge board is outside the scope of the AFBCMR. The discharge board in the applicant's case had opportunity to consider witness testimony and documentary evidence. The applicant had the opportunity to be present and represented by counsel. His counsel had the opportunity to cross-examine Doctor [REDACTED]. The applicant even presented his own expert witness. After considering all the evidence presented, the discharge board found, by a



preponderance of the evidence, he had wrongfully used methamphetamine. The discharge board further recommended a general service characterization was appropriate, which the separation authority approved.

Finally, despite him being discharged with a general service characterization, on his 60th birthday his name was placed on the Air Force Retired List and he became authorized to collect retired pay and also became entitled to Tricare health benefits.

Therefore, AF/JAJI finds no error or injustice has occurred.

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 Oct 23 for comment (Exhibit D), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 U.S.C. § 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 the victim of an error or injustice. While the Board notes the recommendation of AF/JAJI against correcting the record, the Board finds a preponderance of the evidence supports relief. The Board does not question the validity of the applicant's urine specimen test results, nor does the Board find fault with the Discharge Board's discharge recommendation and subsequent service characterization; however, the Board notes that enough time has passed since his discharge and the applicant has had an unblemished post-service career including community service as a medic. In addition, the Board notes the applicant completed the requisite number of years to qualify for retirement and just because he failed to apply, the Board is unwilling to hold that against him. Therefore, the Board recommends correcting the applicant's records as indicated below.

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 that:

1. On 2 Feb 00, the Secretary of the Air Force approved the applicant's application to transfer to the Retired Reserve.

2. On 10 Aug 00, according to Reserve Order [REDACTED] dated 26 Jul 00, the applicant was discharged from the AFR with a service characterization of honorable.

3. He applied for and was granted a Reserve Retirement.



[REDACTED]

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-2023-02172 in Executive Session on 9 Apr 24:

[REDACTED] Panel Chair
[REDACTED] Panel Member
[REDACTED] Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 25 May 23.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 25 Aug 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Oct 23.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 19 Oct 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.

8/13/2025

X [REDACTED]
[REDACTED]
Board Operations Manager, AFBCMR
Signed by: USAF

[REDACTED]