

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

DEC 11 1998

IN THE MATTER OF:

DOCKET NUMBER: 96-02935

IN RE: [REDACTED]

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

Her discharge be voided and she be reinstated to active duty, or in the alternative, the narrative reason for her separation be changed to "Convenience of the Government" and her Reenlistment Eligibility (RE) code be upgraded.

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APPLICANT CONTENDS THAT:

At no time was she asked, or did she admit to, homosexual orientation or conduct.

The applicant states that Department of Defense (DOD) policy clearly states there is a key distinction between orientation and conduct. Conduct is defined as an act, statement, or marriage/attempted marriage. Act is defined as bodily contact, between members of the same sex for the purpose of satisfying sexual desires. Statement is defined as a remark by the member, that the member is a homosexual. The policy further states that the commander initiates separation action if there is probable cause to believe a member has engaged in homosexual conduct. However, she was never charged and never admitted to any such action. The applicant contends that her discharge was based on accusations, none of which were proven. In addition, the creditability and character of the accusers were never investigated. The allegations against her were never proven and the commander never initiated an inquiry into the alleged homosexual conduct. DOD policy clearly states that inquiries are based on factual and creditable information that a basis for discharge exists. This did not occur in her case. She chose to waive her rights to an administrative discharge board because she did not want to further experience the personal humiliation and aggravation she had already experienced. She believes that she was viewed, in all senses of the word, as guilty prior to trial. Furthermore, when she accepted the honorable discharge, she was told it was not an admittance to the allegations of homosexual conduct/orientation. The reason for her discharge and RE code of RE-2C scars her future job opportunities; government or civilian.

The applicant's complete submission is attached at Exhibit A.

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STATEMENT OF FACTS:

On 15 September 1992, the applicant enlisted in the Regular Air Force for a period of 4 years.

On 11 April 1996, the applicant received a Letter of Reprimand for conduct prejudicial to good order and discipline. Specifically, that she was lying on a twin-size bed in the bedroom with a female with her blouse unbuttoned to the bottom button on one occasion and seen lying with said female on a sofa with her blouse undone except for one on another. Additionally, that she stated to her roommate that she was a homosexual, or words to that effect, and that she was involved in an ongoing homosexual relationship with a female at or near [REDACTED]

The applicant was notified by her commander on 30 May 1996, that administrative discharge action was being initiated against her for homosexual conduct. Specifically, that she did between 12 March 1996 and 7 April 1996, wrongfully engage in conduct prejudicial to good order and discipline. To wit, she was seen lying with a female with her blouse unbuttoned to the bottom button on one occasion and seen lying with said female on a sofa with her blouse undone except for one on another. Additionally, that she stated to her roommate that she was a homosexual, or words to that effect, and that she was involved in an ongoing homosexual relationship with a female at or near [REDACTED]. The commander advised the applicant that if approved, she could receive a general discharge.

On 19 June 1996, the applicant waived her right to an administrative discharge board, contingent upon her receipt of no less than an honorable discharge.

On 9 July 1996, the discharge authority accepted the conditional waiver and directed that the applicant be separated with an honorable discharge.

On 17 July 1996, the applicant was honorably discharged under the provisions of AFI 36-3208 (Homosexual Admission). She was issued an RE code of RE-2C. She completed 3 years, 10 months, and 3 years of active service.

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AIR FORCE EVALUATION:

The Programs and Procedures Branch, AFPC/DPPRP, reviewed this application and states that there are no errors or irregularities causing an injustice to the applicant. The discharge complies with directives in effect at the time of her discharge. The

records indicate the applicant's military service was reviewed and appropriate action was taken. They note that applicant did not identify any specific errors in the discharge processing nor provide facts which warrant a change in her narrative reason for discharge. Therefore, they recommend applicant's request be denied.

A complete copy of the Air Force evaluation is attached at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A complete copy of the Air Force evaluation was forwarded to the applicant on 11 November 1996, for review and response within 30 days (Exhibit D).

From 12 December 1996 to 22 November 1997, the applicant's counsel has been provided extensions of time to response to the advisory opinion (Exhibits E through O).

The applicant's counsel reviewed the Air Force evaluation and states that the applicant's discharge was not in compliance with applicable directives or regulations. In this respect, counsel notes the following:

1. The applicant did not receive proper notice of the proposed basis for discharge. Applicant was initially advised that her basis for discharge was homosexual conduct, with no mention of homosexual admission except by numerical reference to AFI 36-3208. The lengthy narrative reason for discharge which followed was confusing, so that the alleged admission is lost in references to acts, homosexual or otherwise, and to conduct prejudicial to good order and discipline. By regulation, and as a matter of due process, the applicant was entitled to a clear and specific description of the reason for discharge.

2. The applicant was wrongly advised of the burden of proof in the notification letter.

Counsel's complete response is attached at Exhibit P.

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ADDITIONAL AIR FORCE EVALUATION:

The Chief, General Law Division, AF/JAG, reviewed this application and states the following:

- a. Whether the applicant made a homosexual statement is a question of fact. The inquiry officer's (IO's) finding that she did was based on testimony of two airmen. According to the testimony, when the applicant was told that others were looking into allegations of her (the applicant) being a lesbian, the

applicant said, "Well, between us, . . ." The applicant denies ever saying she was a lesbian. The applicant's counsel contends that even if she did say those words are susceptible of numerous interpretations, most of them "innocent." From all indications, the summary of the testimony contains an exact quote of the applicant's statement. Despite the lack of evidence of precisely what question or comment preceded this statement, they believe the nature of the conversation, compels the conclusion the applicant was acknowledging that she was homosexual.

b. Although verbatim testimony might have disclosed more, the IO, commander, and witnesses all believed the comment to be a statement of homosexual orientation. In their opinion, this is a reasonable interpretation of the comment. The policy on homosexual conduct does not require the express statement, "I am a homosexual" in order to support a discharge. Other verbal statements reasonably interpreted to be statements of homosexual orientation suffice, as do actions or gestures under circumstances reasonably evidencing them to be nonverbal statements of homosexual orientation. On the other hand, the evidence supporting the second allegation of a homosexual statement (" . . . that you were involved in an ongoing homosexual relationship with a female at or near McGuire AFB") is more removed and less clear. Nevertheless, even if this statement is given no weight, the prior statement standing alone is sufficient to support the separation action.

c. They do not agree with the applicant's contention that the inquiry was flawed in such a way as to violate her substantive rights and require its exclusion as evidence in the discharge proceedings. While it might have been preferable for the commander's appointment letter to spell out the specific information he considered in ordering the inquiry, it appears he had received information about specific acts and statements, reportedly homosexual in nature, which if verified would form a basis for discharge.

d. Applicant's assertion that prior inquiries or investigations were conducted without proper authority, and that these somehow tainted the one official inquiry, is tenuous at best. There were no official inquiries prior to the one initiated by the commander.

e. They are unpersuaded by the applicant's arguments regarding alleged legal errors in the discharge process. First, the notification memorandum is quite clear about the reason for discharge. While it could have been improved on overall, the very first sentence stated, "I am recommending your discharge from the [USAF] for Homosexual Conduct,". The applicant claims that she had no reason to expect her DD Form 214 to reflect a homosexual admission. Whether or not the notification letter was confusing as to the acts, she was clearly on notice that homosexual statements were the basis for the case. Any doubt as

to the meaning of homosexual "conduct" would have been resolved by a quick reference to AFI 36-3208, which defines "conduct" to include acts, statements, and marriages.

f. They disagree that the notification memorandum improperly informed the applicant of the burden of proof at an administrative discharge board. The language she points to correctly states her right to rebut the presumption created by the homosexual statement. Nowhere does it say the government is relieved of its burden of proving she made the statement in the first place, or that it was, under the circumstances, a homosexual statement.

g. The burden rests on the applicant to establish the existence of an error or injustice. To now state that she was not properly counseled is decidedly self serving. The applicant must bear some responsibility for the decision to waive the board.

h. The applicant's reliance on an Army Board for Correction of Military Records case is misplaced. Although that Board voided a discharge for homosexuality (issued in 1987) because the Army failed to comply with its own regulation, it did so on the ground that the Army wrongly refused that applicant's request for a board hearing, where the governing regulation clearly granted him that due process right.

i. While certain aspects of the case might have been improved on, the evidence is sufficient to support a determination that the applicant made a homosexual statement. She was afforded all due process, was represented by counsel, and voluntarily waived her right to present these arguments, factual and legal, to a discharge board. The Air Force properly discharged her for homosexual conduct and issued a DD Form 214 consistent with its standard practice. They see no error or injustice that warrants relief,

A complete copy of the Air Force evaluation is attached at Exhibit Q.

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**APPLICANT'S REVIEW OF AIR FORCE EVALUATION:**

A complete copy of the Air Force evaluation was forwarded to the applicant on 16 March 1998, for review and response .-within 30 **days**. However, as of this date, no response has been received by this office,

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**THE BOARD CONCLUDES THAT:**

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable injustice to warrant changing the applicant's narrative reason for separation. The applicant contends the reason for her discharge is scaring her future government or civilian job opportunities. In view of this, and in an effort to remove the stigma attached to her narrative reason for discharge, we believe the applicant's narrative reason for separation should be changed in the interest of equity and justice. Therefore, we recommend her records be corrected to the extent indicated below.

4. Insufficient relevant evidence has been presented to demonstrate the existence of probable injustice to warrant reinstating the applicant to active duty and changing her Reenlistment Eligibility (RE) code. After thoroughly reviewing the evidence of record and noting the applicant's contentions, we are not persuaded that she should be reinstated to active duty. We note the applicant was notified by her commander that administrative discharge action was being initiated against her for homosexual conduct. The applicant was provided an opportunity to present her case to an administrative discharge board; however, after consulting with her military counsel, she waived her right to do so, contingent upon her receipt of no less than an honorable discharge. Although the applicant contends she was miscounseled, she has failed to provide sufficient evidence to support this contention. In addition, contrary to the applicant's belief, her discharge was in accordance with directives in effect at the time of her discharge and it appears she was provided all rights to which entitled. Although the discharge notification letter indicated that she was being recommended for discharge for homosexual conduct, it clearly indicated the basis for the action was her homosexual statements. Regardless, AFI 36-3208 defines homosexual conduct to include acts, statements, and marriages. The RE code of "2C" indicates that she was honorably discharged. The RE code is correct and since we find no way that this code is detrimental to her seeking employment, we do not recommend changing the RE code. Therefore, in the absence of evidence to the contrary, we find no basis upon which to recommend favorable consideration of her request for reinstatement to active duty.

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THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that on 17 July 1996, she was honorably discharged under the provisions of AFI 36-3208, paragraph 1.2 (Secretarial Authority), Separation Program Designator (SPD) code "KFF".

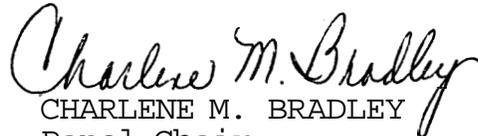
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The following members of the Board considered this application in Executive Session on 14 May 1998, under the provisions of AFI 36-2603:

Ms. Charlene M. Bradley, Panel Chair  
Dr. Gerald B. Kauvar, Member  
Mr. Terry A. Yonkers, Member  
Mr. Phillip E. Horton, Examiner (without vote)

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 28 Sep 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPRP, dated 24 Oct 96.
- Exhibit D. Letter, SAF/MIBR, dated 11 Nov 96.
- Exhibit E. Letter, AFBCMR, dated 12 Dec 96.
- Exhibit F. Letter, Counsel, dated 10 Mar 97.
- Exhibit G. Letter, AFBCMR, dated 14 Mar 97.
- Exhibit H. Letter, Counsel, dated 8 May 97.
- Exhibit I. Letter, AFBCMR, dated 8 May 97.
- Exhibit J. Letter, Counsel, dated 1 Jul 97.
- Exhibit K. Letter, AFBCMR, dated 9 Jul 97.
- Exhibit L. Letter, Counsel, dated 15 Sep 97.
- Exhibit M. Letter, Counsel, dated 30 Sep 97.
- Exhibit N. Letter, Counsel, dated 14 Oct 97.
- Exhibit O. Letter, Counsel, dated 17 Nov 97.
- Exhibit P. Letter, Counsel, dated 21 Nov 97, w/atchs.
- Exhibit Q. Letter, AF/JAG, dated 17 Feb 98.
- Exhibit R. Letter, SAF/MIBR, dated 16 Mar 98.

  
CHARLENE M. BRADLEY  
Panel Chair



DEPARTMENT OF THE AIR FORCE  
WASHINGTON, D. C.

DEC 11 1998

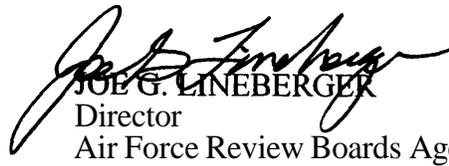
Office of the Assistant Secretary

AFBCMR 96-02935

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that on 17 July 1996, she was honorably discharged under the provisions of AFI 36-3208, paragraph 1.2 (Secretarial Authority), Separation Program Designator (SPD) code "KFF".

  
JOE G. LINEBERGER  
Director  
Air Force Review Boards Agency