

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2009-02394

XXXXXXXXXXXXX

COUNSEL: NONE

(AKA) XXXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider her request for the following:

- a. Her general (under honorable conditions) discharge be upgraded to honorable.
- b. Her narrative reason and corresponding separation code be changed to MBK, *Completion of Required Active Service*, with a contract completion date of 7 Jun 04.
- c. Her 2B reentry code, which denotes "Separated with a general or under other than honorable conditions discharge" be changed to a reentry code that denotes "Eligible for Immediate Reenlistment."
- d. She be awarded the Air Force Good Conduct Medal and the Air Force Achievement Medal (**New Request**).
- e. Her name and gender be changed to reflect her current legal name and gender.

RESUME OF THE CASE

The applicant is a former Air Force airman first class (E-3) who was discharged on 26 Mar 04 with a general service characterization for misconduct.

On 19 Aug 10, the Board considered and denied her request for a discharge upgrade to include a change to her reentry code, narrative reason for separation and corresponding separation code; reinstatement to the rank of senior airman (E-4); award of Air Force Good Conduct Medal, Small Arms Expert Marksmanship Ribbon, and Basic Training Honor Graduate Ribbon; and annotation of Airman Leadership School on her DD Form 214, *Certificate of Release or Discharge from Active Duty*. The Board found the applicant had provided insufficient evidence of an error or injustice to justify relief finding no indication the actions taken to direct her discharge were improper or contrary to the provisions of the governing regulations in effect at the time, or the actions taken against the applicant were based on factors other than her own misconduct. Furthermore, because of the lack of documentation concerning her activities since leaving the service, the Board was not inclined to recommend upgrading her discharge. With regard to the applicant's request for reinstatement to the rank of senior airman, the Board found no evidence which was shown to their satisfaction that her rank was in error. Additionally, with regard to the applicant's request that she be awarded the Air Force Good Conduct Medal, Small Arms Expert Marksmanship Ribbon and Basic Training Honor Graduate Ribbon, the Board agreed with the opinion and recommendation of the Air Force office of primary responsibility and adopted its rationale as the basis for their conclusion that relief beyond that already granted administratively was not warranted.

On 17 May 16, the Board reconsidered and denied her request for a discharge upgrade to include a change to her reentry code, narrative reason for separation and corresponding separation code; reinstatement to the rank of senior airman; and award of Air Force Good Conduct Medal, Small Arms Expert Marksmanship Ribbon and Basic Training Honor Graduate Ribbon; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board thoroughly reviewed the additional documentation submitted in support of her appeal but found the applicant did not overcome the rationale expressed in their previous decision. The letters of support, her service with the Army National Guard, and her educational achievement were noted; however, were not sufficient to warrant favorable consideration.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letters and Records of Proceedings at Exhibits H and K.

On 19 Dec 22, the applicant requested reconsideration of her request for a discharge upgrade to include a change to her reentry code, narrative reason for separation and corresponding separation code; award of Air Force Good Conduct Medal and Air Force Achievement Medal, and a name and gender change. She again contends accusations made against her were due to reprisals for her efforts to expose several issues within her unit as it pertained to sexual harassment, sexual assaults, mistreatment of the lesbian, gay, bisexual, transgender, queer, intersex, asexual [LGBTQIA+] members of the unit during Don't Ask, Don't Tell policies, and significant maintenance malpractice problems. False documentation was presented stating she signed off on work that was never completed. She was a vocal supporter of women and queer service members' rights, which did not go unnoticed and she was severely punished repeatedly for speaking out. She had no real provable history of misconduct and was reprised against for speaking up. Since her discharge from the Air Force, she has continued to service honorably, with a stellar record and is preparing to retire from the Army National Guard. She has also come out as transgender and has been living and serving as a woman in the service since 2019. The applicant checked sexual assault/harassment on her application but did not indicate she was a victim of sexual assault or harassment.

In support of her reconsideration request, the applicant submitted the following new evidence: (1) copies of her DD Forms 214 from her active service in the Army National Guard; (2) Awards and Letters of Appreciation from her time in the Army National Guard; (3) Name Change Court Order; and (4) copies of her Master's and Doctorate's Degree Certificates.

The applicant's complete submission is at Exhibit L.

On 2 Feb 23, the Board staff sent a letter to the applicant informing her to complete a Standard Form 180 and forward it to the Air Force Personnel Center (AFPC) along with pertinent documents to have her name corrected on her DD Form 214 (Exhibit M).

On 9 Feb 23, an email was sent to the DAF/IG office to request case files pertaining to the applicant. The office confirmed no files were available and stated the Automated Case Tracking System (ACTS) database has a ten year disposition date for any closed case. Based on the timeframe provided, DAF/IG would no longer have records.

POST-SERVICE INFORMATION

On 9 Feb 23, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, she has not replied.

APPLICABLE AUTHORITY/GUIDANCE

Title 10, United States Code, Section 1168: Discharge or release from active duty: limitation; DoDI 1336.01, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*; AFI 36-3202, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*; DD Form 214 Total Force Personnel Services Delivery Guide.

Gender is no longer an authorized entry on the DD Form 214. DD Forms 214 were first issued on 1 Jan 50, and were titled *Armed Forces of the United States Report of Transfer or Discharge*, (1950-1972). In 1972, the name was changed to *Report of Separation from Active Duty*, and included a gender marker. In 1979 the title was changed to *Certificate of Release or Discharge from Active Duty* (1979-Present). The current version does not include the member's gender.

According to Air Force Manual (AFMAN) 36-2906, *Awards and Memorialization Program*, the Air Force Good Conduct Medal was authorized by Congress on 6 Jul 60, with the creation of the other medals of the Air Force. The medal was not created until 1 Jun 63 when the Secretary of the Air Force established it. It is awarded to Air Force enlisted personnel for exemplary conduct during a three-year period of active military service, (or for a one-year period of service during a time of war). Persons awarded this medal must have had character and efficiency ratings of excellent or higher throughout the qualifying period, including time spent in attendance at service schools, and there must have been no convictions of court martial during this period.

The Air Force Achievement Medal was authorized by the Secretary of the Air Force on 20 Oct 80. It is awarded to Air Force personnel for outstanding achievement or meritorious service rendered specifically on behalf of the Air Force. It may also be awarded for acts of courage lesser than for award of the Air Force Commendation Medal.

On 20 Sep 11, with the repeal of the law commonly known as Don't Ask, Don't Tell, 10 U.S.C. § 654, the Department of Defense (DoD) issued supplemental policy guidance on correcting military records of former service members who had been discharged under that law or a precursor. The guidance applied to the following types of requests: changing the narrative reason for a discharge; re-characterizing service as honorable; changing a reentry code to one allowing immediate eligibility to reenter service. The guidance directed that such requests should normally be granted when both of the following conditions are true: (1) the original discharge was based solely on Don't Ask, Don't Tell or a similar policy in place prior to enactment of Don't Ask, Don't Tell; and (2) there were no aggravating factors in the record, such as misconduct. For meritorious cases, the guidance further directed the use of "Secretarial Authority" as the new narrative reason for separation, with Separation Program Designator code "JFF" and reentry code "1J." Finally, the guidance noted that while each request must be evaluated individually, an honorable or under honorable conditions (general) discharge should normally be considered to indicate the absence of aggravating factors.

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 Post Traumatic Stress Syndrome (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 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 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance 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 the supplemental guidance, paragraphs 6 and 7.

On 9 Feb 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit N).

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 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.

Under Honorable Conditions (General). 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 airman's military record.

FINDINGS AND CONCLUSION

1. The application was timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board except for her request to have her name changed. A letter was sent to the applicant informing her to complete a SF 180 and forward it to AFPC along with pertinent documents to have the name corrected on her DD Form 214.

3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an injustice. While the Board finds no error in the original discharge process, the Board recommends relief based on fundamental fairness. The Board contemplated the many principles included in the Wilkie Memo to determine whether to grant relief based on an injustice or fundamental fairness. Furthermore, the Board considered the applicant's post-service conduct and achievements, length of time since the misconduct, her character and reputation, service to the community, job history and degree of contrition. Even though the applicant did not provide an FBI report, the Board finds her service in the Army sufficient to satisfy this requirement as proof of employment in which background checks are part of the hiring process. Given the evidence presented, the Board finds the applicant's post-service accomplishments sufficient enough to warrant a discharge upgrade. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. In this respect the Board notes the applicant has requested the gender be changed on her DD Form 214. However, given that gender is not an authorized entry on the DD Form 214, the Board finds no evidence of an error or injustice in this portion of her request. Additionally, regarding her request for award of the Air Force Good Conduct Medal and the Air Force Achievement Medal, the Board finds no evidence the applicant met the requirements to be awarded these medals. In view of the forgoing, the Board recommends correcting the applicant's records as indicated below.

4. The applicant alleges she has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 U.S.C. § 1034). By policy, reprisal complaints must be filed within one year of the alleged incident or discovery to facilitate the inspector general (IG) investigation. However, the applicant has not provided any evidence that she filed an IG complaint alleging reprisal. Nevertheless, the Board reviewed the complete evidence of record to reach its own independent determination of whether reprisal occurred. Based on their review, the applicant has failed to provide substantial evidence to establish that she was reprised against for making a protected communication. Therefore, in the absence of persuasive evidence to the contrary, the Board does not find that the applicant has been the victim of reprisal.

5. 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 on 26 Mar 04, she was discharged with service characterized as honorable, a separation code and corresponding narrative reason for separation of JFF, *Secretarial Authority*, and a reentry code of 3K.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

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-2009-02394 in Executive Session on 18 May 23:

, 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 19 Aug 10.
Exhibit K: Addendum Record of Proceedings, w/ Exhibits I-J, dated 17 May 16.
Exhibit L: Application, DD Form 149, w/atchs, dated 19 Dec 22.
Exhibit M: Letter, SAF/MRBC, (Name Change Bulletin), 2 Feb 23.
Exhibit N: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 9 Feb 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.

X

Board Operations Manager, AFBCMR