



**CUI//SP-MIL/SP-PRVCY**

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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2019-00835

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

His undesirable discharge for unfitness be upgraded to honorable.

**APPLICANT'S CONTENTIONS**

In the summer of 1960 he was told by his first sergeant that he was being investigated but was never told why. He was being promoted regularly and received the Good Conduct Medal and the Air Force Longevity Service Award. Due to racial prejudice he was discharged; being a Black person in Idaho was a very unfriendly experience and he knew of another Black person that was discharged for unknown reasons. He was informed that his claim for benefits has been impacted by the type of discharged he received and wants justice for his name.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is a former Air Force airman first class (E-4).

On 15 Nov 60, according to an Air Force Office of Special Investigations statement, an AFOSI Special Agent informed the applicant he was suspected of being involved in homosexual activity and whether or not he made a statement regarding the offense, it could be used against him in a trial by court-martial. The applicant voluntarily made a statement detailing his encounters and admitted he had homosexual interests.

On 17 Nov 60, the applicant's commander notified him he was recommending he be discharged from the Air Force, under the provisions of AFR 35-66, *Discharge of Homosexuals*, paragraph 12, as a Class II homosexual. He informed the applicant if court-martial action if not applicable or appropriate, he recommends he be issued a general discharge. AFR 35-66 classifies Class II cases as those where a member has willfully engaged in one or more homosexual acts or has proposed or attempted to perform the act of homosexuality.

On 18 Nov 60, the Staff Judge Advocate (SJA) found the discharge action legally sufficient. Notwithstanding the squadron commander's recommendation for a general discharge, the SJA recommended an undesirable discharge.

On 22 Nov 60, the discharge authority directed the applicant be discharged with an undesirable service characterization.

Controlled by: SAF/MRB CUI Categories: SP-MIL/SP-PRVCY Limited Dissemination Control: N/A POC: <a href="mailto:SAF.MRBC.Workflow@us.af.mil">SAF.MRBC.Workflow@us.af.mil</a>
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On 15 Dec 60, Special Order No. xx indicates the applicant was discharged under other than honorable conditions, effective 19 Dec 60. The discharge authority is 39-17, *Discharge of Airmen Because of Unfitness*, and his separation program number (SDN) is 257, Homosexual – Class II.

On 19 Dec 60, the applicant received an undesirable discharge. He was credited with 5 years, 11 months, and 12 days of total active service.

On 25 Mar 81, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge and a change to his narrative reason.

On 18 Jan 83, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

### **POST-SERVICE INFORMATION**

On 15 Apr 19, 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 19 Apr 22 and provided an FBI report. According to the report, the applicant was arrested on 8 Jun 61 for solicitation.

The applicant's complete response is at Exhibit D.

### **APPLICABLE AUTHORITY/GUIDANCE**

Air Force Regulation 35-66, *Discharge of Homosexuals*, dated 31 May 54. Homosexuals are classified within several categories and are classified as follows:

**Class I:** Those cases accompanied by assault or coercion as characterized by any act in or to which the other person involved did not willingly cooperate or consent, or where the consent was obtained through force, fraud, or actual intimidation; thereby, constituting the invasion of the rights of another, or the commission of a homosexual act with a minor under the age of consent, whether the minor cooperated or not. Trial by court-martial is usually appropriate. In no case will persons in Class I be administratively discharged until the entire case has been submitted to the Secretary of the Air Force who will determine whether such action is in the best interest of the service.

**Class II:** Those cases wherein personnel have willfully engaged in one or more homosexual acts, or where evidence supports proposal or attempt to perform an act of homosexuality which do not fall into the Class I category. Distinction is not made in the administrative handling of cases of alleged participation in homosexual acts based upon whether or not the role of the person in any particular act was active or passive. Discharge for Class II homosexuals will normally be under conditions other than honorable.

**Class III:** Those cases wherein personnel exhibit, profess, or admit homosexual tendencies, or habitually and knowingly associate themselves with true, confirmed homosexuals and wherein there are no specific homosexual acts or offenses.

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On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) 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 20 Sep 11, with the repeal of the law commonly known as “Don’t Ask, Don’t Tell” (DADT), 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 DADT or a similar policy in place prior to enactment of DADT; 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 (SPD) 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.

The complete DoD policies are at Exhibits C and E.

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

**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.

**Under Other than Honorable Conditions.** 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 airmen. 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 Air Force.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.

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- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

### **AIR FORCE EVALUATION**

AFPC/JA recommends denying the application due to lack of information regarding allegations of racism and the lack of information regarding the alleged “clearly aggravated nature” of the homosexual acts which formed the basis for discharge. The applicant was discharged 19 Dec 60 under AFR 35-66, paragraph 2(b)(2), (Class II Homosexual). However, the applicant’s current request for relief does not cite to current policy regarding the repeal of Don’t Ask, Don’t Tell (DADT) 10 U.S.C. § 654, which allows for the correction of military records in accordance with applicable guidance. Rather, his request cites to racism as the reason for his erroneous discharge and service characterization. The applicant's request for relief is based on allegations of racism, but is not supported by substantive facts or evidence. Other than a seven-line paragraph in a memo dated 25 Sep 18, where he notes how few Black airmen and families were in Idaho at the time, the applicant provides no direct connection between the racism that was likely prevalent both on the base and in the community, and his discharge for homosexuality. Moreover, while the applicant might otherwise be entitled to a characterization upgrade if his discharge was purely for homosexuality, the AFDRB Record of Hearing indicates that his conduct included solicitation of junior airmen and potential sexual acts with a minor dependent. It is worth noting the AFDRB Record of Hearing is the sole characterization of the applicant’s conduct as “clearly of an aggravated nature,” however, the applicant has provided no evidence to the contrary. As such, the applicant appears to fall outside of both the applicable homosexual discharge guidance in place when he appealed to the AFDRB in 1983 and the DADT guidance issued in 2011.

The complete advisory opinion is at Exhibit G.

### **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 1 Dec 22 for comment (Exhibit H), but has received no response.

### **ADDITIONAL AIR FORCE EVALUATION**

AFPC/JA provided a supplemental advisory to provide clarity on what information and legal standard the AFBCMR should consider in its deliberative process. The AFBCMR is permitted and encouraged to review the facts anew and to assess the applicability of the Under Secretary of Defense (USecDEF) guidance. The AFBCMR is not bound by the previous decisions of the separation authority or the AFDRB. Rather the AFBCMR is bound by Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.4, to provide relief only where there has been a material error or injustice. If after a review of the entire case file, the AFBCMR finds the USecDEF Guidance does not warrant relief, the AFBCMR may deny relief. If the AFBCMR does not find any aggravating factors or misconduct exist in the record regarding this discharge, the board may grant the requested relief.

On 20 Sep 11, the USecDEF issued guidance in concert with the repeal of DADT, 10 U.S.C. § 654. This guidance stated that requests made by members separated under the DADT policy to change the characterization of service, the separation or reenlistment code, and the narrative reason for separation should be granted. This guidance also stated that the requests should be granted when no aggravating factors existed in the record (i.e., misconduct) and the original discharge was based solely upon DADT or similar policy.

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The applicant was notified that he was facing discharge for homosexual acts under AFR 35-66 (Homosexual Acts) and of his rights to a discharge board, to submit evidence, and to be represented by counsel. The applicant submitted a waiver of the board and did not submit statements on his behalf. The applicant's waiver was accepted and he was discharged under other than honorable conditions, Class II. The applicant appealed the nature of his discharge to the AFDRB. The applicant appeared in person with counsel and testified on his own behalf. The board found that applicant was not entitled to relief under applicable rules as the applicant's behavior was "clearly of an aggravated nature" and the AFDRB denied applicant's request for relief. It is worth noting, there is no transcript from the hearing in the record, rather a two-page summary prepared by the board. Said summary did not reference specific pieces of evidence in support of its conclusion.

The complete advisory opinion is at Exhibit I.

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

The Board sent a copy of the advisory opinion to the applicant on 3 May 23 for comment (Exhibit J), but has received no response.

**FINDINGS AND CONCLUSION**

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
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 injustice. While the Board finds no error in the original discharge process, the Board recommends relief based on the repeal of 10 U.S.C. § 654. The Board acknowledges the applicant's contention that he was discriminated against and that inequality and systemic racism was the root of his discharge, however, other than his own assertions, the Board does not find sufficient evidence this was the reason for his discharge. However, the applicant was discharged as a Class II homosexual and the Board finds an absence of aggravating factors in the applicant's record meets the criteria of the DoD policy on records correction following the repeal of DADT. Therefore, the Board recommends correcting the applicant's record as indicated below.

**RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the DD Form 214, *Armed Forces of the United States Report of Transfer or Discharge*, issued on 19 Dec 60, be amended to reflect he was discharged under the provisions of AFR 39-10, with service characterized as Honorable, a Separation Code and corresponding Narrative Reason for Separation of JFF, *Secretarial Authority*, and a Reentry Code of 1J.

**CERTIFICATION**

The following quorum of the Board, as defined in DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2019-00835 in Executive Session on 6 Jul 23:

- , Chair, AFBCMR
- , Panel Member
- , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 19 Sep 18.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 15 Apr 19.
- Exhibit D: FBI Report, dated, 19 Apr 22.
- Exhibit E: DoD Policy on Correcting Military Records after Repeal of DADT, 20 Sep 11.
- Exhibit F: Notification of DoD Policy, SAF/MRBC to applicant, dated 4 Nov 22.
- Exhibit G: Advisory Opinion, AFPC/JA, dated 29 Nov 22.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 1 Dec 22.
- Exhibit I: Advisory Opinion, AFPC/JA, dated 24 Apr 23.
- Exhibit J: Notification of Advisory, SAF/MRBC to Applicant,

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.

9/1/2023

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**X**

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Board Operations Manager, AFBCMR