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## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-01357

XXXXXXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

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### APPLICANT'S REQUEST

1. Her general (under other than honorable conditions) discharge [sic] be upgraded to honorable. **(Administratively Corrected to UOTHOC discharge).**
2. Her narrative reason for discharge [sic] be changed to "Secretarial Authority."
3. Her Air Force Achievement Medal be updated on her DD Form 214, *Certificate of Release or Discharge from Active Duty*. **(No Board Action – Administratively Corrected).**

### APPLICANT'S CONTENTIONS

She had difficulties adjusting to her new life in the military and accepting her sexuality. She experienced high levels of anxiety and depression due to her fellow service members' reactions to her sexuality and her inability to report passive-aggressive comments made towards her causing her to make poor decisions relating to her responsibilities in the military and individuals she chose to hang around. Due to "Don't Ask Don't Tell" in effect at the time, she did not have the resources to report her fellow service members' treatment of her, which caused her to feel depressed. Since her discharge, she has used her experience to better herself and the community around her through both volunteer work and advocacy.

In support of her request for clemency, the applicant provides a personal statement, resume, Graduation Certificate, Honor Society Certificate, and two Character Reference Letters.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 27 Oct 99, the applicant's commander recommended the applicant be discharged from the Air Force with an UOTHOC discharge and advised the applicant she has a right to counsel, to present her case to an administrative discharge board, and to submit statements on her behalf in addition to or in lieu of a board hearing.

On 27 Oct 99, the applicant waived her rights to an administrative board hearing and submitted a statement in lieu of a hearing.

On 1 Nov 99, the applicant's commander reviewed the statement submitted by the applicant and continued to recommend she be discharged UOTHC from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.50.2. for a pattern of misconduct (prejudicial to good order and discipline). The specific reasons for the action were:

- a. On 16 Jul 99, Letter of Reprimand (LOR) was issued for failure to report for her end of course exam.
- b. On 2 Aug 99, LOR was issued for dereliction of duty.
- c. On 24 Aug 99, LOR was issued for drunken and reckless driving and larceny. Because of these offenses, an unfavorable information file was established.
- d. On 17 Sep 99, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates applicant received nonjudicial punishment, Article 15 for three counts of failure to go. She received a reduction in grade to airman (E-2), suspended until 16 Mar 00, 21 days of extra duty, and 45 days of base restriction.
- e. On 26 Oct 99, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment, Article 15 for unauthorized use of government credit card and making a false statement reporting card was stolen. She received a reduction in grade to airman (E-2), suspended until 16 Mar 00, 21 days of extra duty, and 45 days of base restriction.

On 8 Nov 99, the Staff Judge Advocate found the discharge action legally sufficient recommending approval of the applicant's unconditional waiver of her discharge board and separation with an UOTHC discharge without probation and rehabilitation.

On 16 Nov 99, the discharge authority accepted the applicant's unconditional waiver of her discharge board and directed the applicant be discharged for misconduct prejudicial to good order and discipline, with an UOTHC service characterization. Probation and rehabilitation was considered, but not offered.

On 19 Nov 99, the applicant received a general (UOTHC) discharge [sic]. Her narrative reason for separation is "Misconduct" and she was credited with 2 years, 4 months, and 17 days of total active service.

On 27 Apr 09, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to her discharge.

On 4 Nov 10, 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 advisories at Exhibits D and E.

## **POST-SERVICE INFORMATION**

On 29 Jun 21, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating her case. Although the applicant provided post-service information with her original application, she did not include an FBI background check or other criminal history data.

## **APPLICABLE AUTHORITY/GUIDANCE**

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.

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 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 (USD P&R) 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 (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 29 Jun 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

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.
- 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/DP2SSR recommends denying the applicant's request to upgrade her discharge and change her narrative reason for separation. On 19 Nov 99, the applicant was discharged under the provisions of AFI 36-3208, *Administrative Separation of Airmen* (Misconduct) with an under honorable conditions (general) service characterization [sic]. The commander provided ample documentation to the Base Discharge Authority (BDA) to support separation, the narrative reason, and character of service. The BDA determined that the significant aspects of the applicant's conduct outweighed any positive aspects of the applicant's brief military service.

The complete advisory opinion is at Exhibit D.

The AFBCMR Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to her record. There was no evidence her mental health condition caused any of her misconduct. There were no records she received any mental health evaluation, diagnosis or treatment during service; there were no statements in her records from her leadership, Area Defense Counsel, character witnesses, or the applicant indicating she had suffered from anxiety and depression causing her to engage in her reported multiple misconduct actions and poor decision-making. The applicant had submitted several personal statements at the snapshot in time of service in response to her disciplinary actions, but she did not discuss or mention having any mental health issues she may have experienced during service. Her post-service treatment records also found no report of any mental health issues she endured during service. Giving the applicant the benefit and despite the lack of evidence that it was possible she may have felt anxious and depressed due to treatment received because of her sexuality, it could not explain most or all of her misconduct. The applicant received two Article 15s, multiple LORs, had engaged in drinking and driving while under age, and was considered for special court-martial during service. She had serious misconduct issues in which there was no evidence of any mental health concerns that may cause any of her behaviors. It was contended her age and immaturity may have been a factor to her misconduct, but it is reminded that many other service members were the same age as the applicant when she was in service and many are able to follow rules and do not engage in poor behaviors and serious misconduct. The applicant previously applied to the AFDRB for an upgrade of her service characterization and she made no mental health contentions. The Board applied liberal consideration to the applicant's request due to his contention of a mental health condition. The following are answers to the four questions from the liberal consideration policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant and her now former legal counsel contend she experienced anxiety and depression during service that had impaired her judgment relating to her responsibility in the military and individuals she chose to associate.

2. Did the condition exist or experience occur during military service? There is no evidence the applicant had any mental health conditions to include anxiety and depression during military service. There are no service treatment records available or submitted by the applicant for review to determine if she had any mental health concerns during military service.

3. Does the condition or experience excuse or mitigate the discharge? Since there is no evidence she had any mental health conditions during service and no compelling evidence that her anxiety and depression caused her behaviors and misconduct during service, her condition or experience does not excuse or mitigate her discharge.

4. Does the condition or experience outweighs the discharge? Since there is no evidence she had any mental health conditions to include anxiety and depression during service, her condition or experience also does not outweigh her original discharge.

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 3 Feb 22 for comment (Exhibit F), but has received no response.

#### **FINDINGS AND CONCLUSION**

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency 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 not the victim of an error or injustice. The Board concurs with the rationale and recommendation of offices of primary responsibility and finds a preponderance of the evidence does not substantiate the applicant's contentions. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Furthermore, the Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request as there is no evidence she had any mental health conditions during service and no compelling evidence that her anxiety and depression caused her behaviors and misconduct during service, therefore, her condition or experience does not excuse, mitigate, or outweigh her discharge. Therefore, the Board recommends against correcting the applicant's records.

## RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-01357 in Executive Session on 23 Mar 22:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 9 Sep 20.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 29 Jun 21.

Exhibit D: Advisory Opinion, AFPC/DP2SSR, dated 10 Sep 21.

Exhibit E: Advisory Opinion, AFBCMR Psychological Advisor, dated 13 Sep 21.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Feb 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

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Board Operations Manager, AFBCMR