

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2021-02267

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His reentry code (RE) code of "2B," which denotes "separated with a general or under-other-than-honorable-conditions discharge" be changed to "3K," which denotes "reserved for use by AFPC or the Air Force Board for Correction of Military Records when no other reentry code applies or is appropriate."

APPLICANT'S CONTENTIONS

On 3 Apr 20, the Air Force Discharge Review Board (AFDRB) agreed to change the narrative reason for separation of his discharge from "Homosexual Act" to "Secretarial Authority," but denied his request to upgrade his discharge to "Honorable" or change his RE code to "3K." The AFDRB failed to properly consider applicable Department of Defense (DoD) policies when deciding his case, which requires consideration of mitigating factors, such as the traumatizing effects of the sexual harassment he experienced each day, as well as the substantial public service work he performed since his discharge. He was harassed and berated because of his sexual orientation which caused him to become depressed and unable to sleep. The traumatizing environment he was subjected to caused him to be continually sick which resulted in minor instances of misconduct involving tardiness and absences from unit evolutions. He would like to reenter the Air Force and serve as a Judge Advocate General (JAG) officer.

In support of his request for clemency, the applicant provides (1) a personal statement, (2) character reference letters, (3) college transcript, (4) an expert opinion from a psychologist, and (5) his complete medical and military records.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 6 Oct 04, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.36 and 5.49 for homosexual conduct and minor disciplinary infractions. The specific reasons for the action were:

- a. On 23 Mar 04, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for dereliction of duty. He received a reduction in grade to airman (E-2), suspended until 22 Sep 04, and seven days of correctional custody.
- b. On 26 Apr 04, a Letter of Counseling (LOC) was issued for receiving a speeding ticket while driving on base.
- c. On 28 Apr 04, a Memorandum of Record (MFR) was issued for failure to show.
- d. On 3 May 04, a MFR was issued for failure to remain on base while on quarters.
- e. On 20 May 04, a MFR was issued for failure to show.
- f. On 21 May 04, a Letter of Reprimand (LOR) was issued for failure to remain on base while on quarters as referenced in the 3 May 04 MFR.
- g. On 4 Jun 04, a MFR was issued for failure to report for duty.
- h. On 7 Jun 04, a MFR was issued for failure to show.
- i. On 18 Jun 04, AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, indicates the applicant violated Article 86 by failing to go. The applicant was reduced to the grade of airman (E-2) with a new date of rank (DOR) of 23 Mar 04.
- j. On 30 Jul 04, a MFR was issued for tardiness.
- k. On 19 Aug 04, AF Form 3070, indicates applicant received NJP, Article 15 for failure to go on three separate occasions. He received a restriction to base for 30 days.

On 18 Oct 04, the Staff Judge Advocate found the discharge action legally sufficient.

On 20 Oct 04, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Homosexual Act" and he was credited with one year, three months, and six days of total active service.

On 3 Jul 19, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 23 Apr 20, 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. However, the board determined the applicant's narrative reason for separation was improper based on the guidance released in conjunction with the repeal of Don't Ask Don't Tell (DADT). Therefore,

the board determined the discharge narrative reason for separation was more accurately described as “Secretarial Authority.” The board did not change the discharge characterization or RE code. Per guidance from the Under Secretary of Defense for Personnel and Readiness (USD P&R), the applicant requests should be approved when the original discharge was based solely on DADT (or a similar policy prior to DADT) and there were no aggravating factors in the record, such as misconduct. However, the AFDRB reviewed the applicant’s entire record and found extensive evidence of misconduct. The AFDRB determined that, through the administrative actions taken by the chain of command in this case, the applicant had ample opportunities to change his negative behavior.

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

POST-SERVICE INFORMATION

On 21 Oct 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 his case. Even though the applicant provided post-service information with his original application, he did not provide 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 21 Oct 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. According to the applicant's available records, he was discharged from service for two reasons, which were identified as Homosexual Conduct and Minor Disciplinary Infractions, according to the Notification Memorandum dated on 6 Oct 04. He was not solely discharged because of his sexual orientation as claimed. His discharge for Homosexual Conduct was listed as the reason on his original DD Form 214, *Certificate of Release or Discharge from Active Duty*, because only one reason could be listed, and this was corrected by the AFDRB per the DADT guidance policy. The AFDRB had deliberated his petition and found he had an extensive pattern of misconduct, and a general discharge was the appropriate characterization for his service. This psychological advisor concurs with the AFDRB's decision.

The applicant's service treatment records revealed he experienced anxiety and sleep issues and was prescribed medications for these conditions by his Primary Care Manager (PCM) and a psychiatrist and attended about two sessions with a psychologist during service. The reasons for his anxiety and sleep issues were attributed to work stressors and situational events. It is possible the vague "situational events" were caused by the harassment pertaining to his sexual orientation as the applicant and his legal counsel contended. There was, however, no evidence he was depressed during service as claimed. The evaluation from the psychiatrist reported the applicant denied he was feeling depressed, and his medical records found he was not given any mood or depressive disorders during service. He was consistently given a diagnosis of General Anxiety Disorder (GAD) and variations of an anxiety disorder. Despite this anomaly, there was evidence he sought and received mental health treatment for his stressors. It is possible his anxiety and sleep issues may cause some of his misconduct such as some of his multiple failure to go infractions, but it could not excuse or mitigate most of his remaining and more serious infractions. As summarized for the Board, there were multiple memos for record (MFR) written by his leadership detailing the applicant's behaviors. These MFRs had reported he was late due to not setting his alarm clock, his car did not start one morning but he decided to not show up to work until almost three hours later until his leadership had to go to his dorm room to check on him, he failed to remain on base while placed on 24-hour quarters but was instead, found to be getting something to eat with a female friend and possibly others, and he threatened to fabricate a mental illness to get medically discharged so he would not face additional punishment for his misconduct. He was also cited for getting a speeding ticket and received his first Article 15 for failure to remain in station while in Phase I training in Texas. The applicant and his legal counsel focused on and addressed his issues of being tardy and not showing up to physical training because he was sexually harassed, but they neglected to explain his behaviors described in the MFRs and/or address his other misconduct such as his speeding ticket and failure to remain on station while in Phase I training. These unaddressed issues do not suggest they were a direct cause of his mental health condition. It was apparent the applicant had difficulties abiding by the rules and adjusting to the military structure and environment. The AFDRB stated he was

given ample opportunities and assistance from his leadership to modify his negative behaviors, but he was unreceptive to their efforts. This Psychological Advisor concurs, his general discharge was appropriate based on details of events described in his objective military records. This psychological advisor acknowledges the applicant's personal statement testimony is acceptable in lieu of actual objective and available evidence to corroborate this statement. However, does not find his personal testimony as compelling enough for the desired upgrade of his discharge and change of reenlistment code due to the aforementioned reasons that were discussed. There were many instances of misconduct that were not attributed to or could be explained by his mental health condition caused by the stressors of being harassed due to his sexual orientation. Furthermore, the applicant identified a particular lieutenant who had harassed him, but his records found other individuals in his chain of command who had counseled, interacted, or observed his behaviors and their justification for disciplinary actions appeared to be appropriate with no evidence they were unjustly or inappropriately given based on his sexual orientation or experience with sexual harassment.

This Psychological Advisor reviewed the independent review performed by a licensed psychologist and agrees his anxiety and sleep issues resulting from his significant sexual harassment experience may mitigate some of his misconduct but disagree that they may mitigate most, all, or even his more serious misconduct and his discharge. Again, the applicant's records found many examples of his behaviors that were not convincingly caused or could be explained by his mental health condition.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the 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 his legal counsel contend he was depressed and had sleep issues caused by his experience of being harassed due to his sexual orientation causing his tardiness and absences from unit evolutions.

2. Did the condition exist or experience occur during military service?

There is evidence the applicant received treatment from his PCM, psychiatrist and psychologist for anxiety and sleep issues during service. There was no evidence he was depressed or given a diagnosis related to depression. There was no objective evidence supporting he experienced sexual harassment or was reprimanded due to his sexual orientation. The applicant's personal testimony of being sexually harassed during service is accepted.

3. Does the condition or experience excuse or mitigate the discharge?

The applicant's mental health condition of anxiety, depression, and sleep issues caused by his sexual harassment experience may cause, excuse, or mitigate some of his misconduct of failure to go, but they do not excuse or mitigate most, all or his more serious misconduct and discharge. The applicant had multiple misconduct infractions with no evidence of a direct impact from his mental health condition or sexual harassment experience.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition and/or sexual harassment experience do not excuse or mitigate most, all or his most serious misconduct, they also do not outweigh his original general discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 16 Nov 21 for comment (Exhibit E), and the applicant replied on 15 Dec 21. In his response, the applicant's counsel contends his treatment by his leadership constituted sexual harassment and created a hostile working environment. The Psychological Advisor failed to consider the expert psychologist's opinion based on the in-person interview with the applicant simply disagreeing with the findings without explaining any deficiencies. The Psychological Advisor also failed to properly consider the Under Secretary of Defense, Clifford Stanley's Memorandum for the Secretaries of the Military Departments, specifically the guidance which states, "although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors." The Psychological Advisor uses the standard "direct impact" when evaluating a connection between the applicant's misconduct and his mental health disorder. Neither the Kurta Memo nor Hagel Memo reflect current guidance relevant to evaluating effects of mental health disorders on a veteran's discharge.

The applicant's complete response is at Exhibit F.

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 notes the applicant believes relief is warranted based on the repeal of "Don't Ask, Don't Tell" (DADT). However, as noted above, 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 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. Based on the Board's review of the evidence of record, the applicant's discharge does not meet either requirement as there are aggravating factors in the record. Moreover, the applicant's discharge was not based solely on Homosexual Conduct, rather Homosexual Conduct and Minor Disciplinary Infractions. Therefore, the Board concurs with the rationale of the AFRBA

Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. In the interest of justice and fundamental fairness, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of substantial post-service information and a criminal history report, the Board finds no basis to do so. Finally, the Board notes the applicant has provided an opinion from a psychologist stating the harassment the applicant endured and resulting anxiety/sleep disorders mitigates the misconduct that led to his general discharge from the USAF. However, the Board does not find the evidence presented sufficient to conclude that his mental health condition or sexual experience excuses, mitigates, or outweighs his general discharge. Therefore, the Board is satisfied that the application of liberal consideration does not warrant relief. Accordingly, the Board recommends against correcting the applicant's record.

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 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-2021-02267 in Executive Session on 26 Jan 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 30 Apr 21.
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 21 Oct 21.
Exhibit D: Advisory Opinion, AFBCMR Psychological Advisor, dated 3 Nov 21.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Nov 21.
Exhibit F: Applicant's Response, w/atchs, dated 15 Dec 21.

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.

X

Board Operations Manager, AFBCMR