
RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02763

XXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable, based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654).

APPLICANT'S CONTENTIONS

He was reprimanded and received a BCD for being gay, as homosexuality was viewed as incompatible with military service. His discharge should be upgraded due to the overturn of the Don't Ask Don't Tell policy change.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 22 Jul 87, the applicant entered the Regular Air Force.

On 5 Mar 90, the applicant's sentence (BCD, reduction to E-1, and a reprimand) was adjudged, finding that between on or about 1 Feb 89 and 15 May 89, he was guilty of sodomy, in violation of Article 125, Uniform Code of Military Justice (UCMJ).

On 3 Jan 91, the applicant received a BCD, under Special Court-Martial Order No. 23, with a separation code and corresponding narrative reason for separation of JJD, *Conviction By Court-Martial (Other Than Desertion)*. He was credited with 3 years, 5 months, and 22 days of active service.

On 13 May 04, the applicant was informed that on 19 Apr 04, the Air Force Discharge Review Board (AFDRB) denied his request for clemency upgrade of his BCD. The AFDRB concluded the applicant's punitive discharge by Special Court-Martial was appropriate under the facts and circumstances, and there is insufficient basis, as an act of clemency, for change of the discharge.

For more information, see the excerpt of the applicant's record at Exhibit B, the DoD policy/Stanley memorandum at Exhibit C, and the advisory at Exhibit E.

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.

The complete DoD policy is at Exhibit C.

APPLICANT’S REVIEW OF APPLICABLE AUTHORITY/GUIDANCE

The Board sent a copy of the DoD policy to the applicant on 8 Nov 21 for comment (Exhibit D) but has received no response.

AIR FORCE EVALUATION

DAF/JA does not offer a specific recommendation but opines after reviewing the background facts of the applicant’s case, the commander did not court-martial the applicant for being gay. They found the applicant misrepresented and/or omitted (unable to determine whether intentionally or unintentionally) the factual bases for his court-martial discharge were the existence of aggravating factors, which cut against DoD policy/the plain letter of the Stanley memorandum.

On 5 Mar 90, a Special Court-Martial found the applicant guilty of violating UCMJ Article 125 (Sodomy) pursuant to his guilty plea. Two airman involved in the sodomy incident were not referred to trial by court-martial for sodomy. Rather, they were separated by administrative discharge, although it is unclear what characterization of service they received. The applicant was sentenced to a reprimand, reduction to E-1, and a BCD. The applicant originally faced prosecution for three charges, the sodomy charge to which he pled guilty; a charge for unlawfully using marijuana; and a charge for failing to follow a lawful order to not discuss his criminal case. The charges for marijuana and orders violation were dropped. Prior to the aforementioned event the applicant received a letter of reprimand (LOR) from his commander for kissing a male airman on the lips and making suggestive gestures towards him (unclear whether this was at the workplace and/or consensual). Also, they noted for the Board that the applicant later alleged to the AFDRB that he did not commit the sodomy crime for which he had already pled guilty, claiming he was TDY to Korea instead. This was false.

They conclude the applicant was convicted and discharged for the specific crime of sodomy, and the totality of his conduct, including several aggravating factors of repeated misconduct and group sex in the barracks, demonstrating he was unfit for continued military service. First, they acknowledge that while the LOR was based on an anti-homosexual policy that has now rightly been repealed, it must be recognized that the military commander was tasked with maintaining good order and discipline, which necessarily included ensuring his airmen followed DoD and Air Force policy, regardless of the current support for its repeal. Therefore, they opine the LOR cuts

against the applicant's contention he was court-martialed and discharged for being gay, instead it supports the position he was court-martialed because of his own aggravating factors. Second, they analyzed the facts of the sodomy conviction. The fact it was part of group sex, being overseas, and in the barracks were aggravating factors, which led the commander to determine the circumstances surrounding the sodomy offense were aggravating enough to warrant a trial by special court-martial rather than an administrative disposition of the case. Third, they note the other two airmen also committed sodomy as part of group sex in the barracks at an overseas base, yet they were not court-martialed. They analyze this fact cut against the applicant's contention that he was court-martialed and discharged for being gay. Rather they concluded he was court-martialed for sodomy, and the commander considered the aggravating factors that were unique to the applicant alone. His conduct was a leadership challenge for his commander who had the duty to carry out DoD and Air Force policy, especially in a forward-deployed environment.

Given the background facts – existing DoD and Air Force policies, previous LOR, group nature of the sex act, unit discipline when rules are violated in the barracks, being forward-deployed, the two airmen were not prosecuted, they conclude the applicant was not court-martialed for being gay. Additionally, the applicant has provided no other evidence to support clemency. While the applicant himself has not provided reason for relief, they strongly urge the BCMR to consider whether the BCD is still warranted. If the Board determines the BCD is no longer appropriate, they advise the guidance limits a discharge upgrade to an under other than honorable conditions discharge. DoD policy/Stanley memorandum is clear that a general or honorable discharge may be appropriate if no aggravating factors, of which there are many in this case.

The complete advisory is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board emailed a copy of the advisory opinion to the applicant on 24 Oct 22 for comment (Exhibit F) but has received no response.

FINDINGS AND CONCLUSION

1. The application is timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board majority concludes the applicant is not the victim of an error or injustice. The Board majority concurs with the rationale and recommendation of DAF/JA and finds a preponderance of the evidence does not substantiate the applicant's contention he was reprimanded and received a BCD for being gay. Specifically, the applicant was convicted for sodomy in violation of Article 125, UCMJ, and discharged for the specific crime of sodomy, and because the totality of his conduct, including several aggravating factors of repeated misconduct and group sex in an overseas barracks. Also, the Board majority took note of the commander's decisional memorandum that supported trial by Special Court-Martial of the applicant because of the circumstances surrounding the offense were aggravating, and that the other two Airman involved in the sodomy case were not prosecuted but were separated by administrative discharge (unclear of characterization). In view of the foregoing, the Board majority finds the evidence presented does not support the applicant's contention he was discharged for being gay. Therefore, the Board recommends against correcting the applicant's records.
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 majority 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-2021-02763 in Executive Session on 2 Feb 23:

, Chair, AFBCMR
, Panel Member
, Panel Member

A majority of the panel voted against correcting the record. XXXXXXXX voted to partially grant the applicant's request by upgrading his discharge to general. The panel considered the following:

- Exhibit A: Application, DD Form 149, dated 5 Nov 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: DoD Policy on Correcting Military Records after Repeal of DADT, dated 20 Sep 11.
- Exhibit D: Notification of DoD Policy, SAF/MRBC to applicant, dated 8 Nov 21.
- Exhibit E: Advisory Opinion, DAF/JA, dated 14 Oct 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Oct 22.
- Exhibit G: Minority Opinion, dated 9 Feb 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings pertaining to Docket Number BC-2021-02763, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR