

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00891

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

1. His Under Dishonorable Conditions discharge be upgraded to Honorable, based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654).
2. He be issued the DD Form 256AF, *Honorable Discharge Certificate*. (**Obsolete – no longer issued by Air Force**)

### APPLICANT'S CONTENTIONS

He served in the Air Force for over three years before his discharge based on an accusation of homosexuality in 1961. He was called in for questioning by legal officers who said another airman reported him for soliciting a sexual encounter, and he did not deny it. There was no allegation that any sexual activity had occurred; the other airman had declined the proposition. Nevertheless, he was questioned about homosexual activity with others during his time in the Air Force. The applicant truthfully denied any such activity but did admit to being intimate with another man before joining the military. He left the interrogation thinking he was in trouble but did not realize the extent. Two weeks later, he was informed he would be administratively separated, and at 22 years old, was discharged with an Under Dishonorable Conditions characterization. After his discharge, he went back to school and earned a beautician certification and began a career as a hairdresser. He has been doing this work ever since. He has been married for 56 years and is the proud father of three children.

For over 60 years, the applicant has been living with the shame and embarrassment of how the military characterized his service. But since his discharge, the military has changed its position concerning homosexuality. With the repeal of the policy commonly known as Don't Ask, Don't Tell (DADT), service members may now make homosexual statements, enter homosexual marriages, and engage in legal homosexual acts without facing separation on the basis of such activities. In addition, the Department of Defense issued guidance indicating that veterans discharged under DADT and prior regulations involving homosexual conduct are eligible for an upgrade if they meet certain criteria. The applicant meets these criteria. The applicant was discharged based solely due to homosexuality and there are no aggravating factors in the record.

The applicant sought his military records from the National Personnel Records Center (NPRC), but the NPRC responded by saying his records were lost; therefore, in the absence of records, the Air Force is not entitled to a presumption of administrative regularity. The applicant submitted a sworn statement, signed under the penalty of perjury, that describes the circumstances of his service and of his administrative separation. Under guidance provided by the Under Secretary of Defense for Personnel and Readiness [Wilkie memo, dated 25 Jul 18], the applicant's sworn statement alone is sufficient to grant relief. Additionally, there is some documentation obtained from NPRC that corroborates the applicant's statement and provides all of the factual detail needed to reconstruct his DD Form 214.

Further, should the application be considered untimely, it is in the interest of justice for the Board to excuse such untimeliness. The Undersecretary of Defense, in a 2011 memo to the Secretaries of the Military Departments and others, all but directed applications such as this one be considered. The Stanley Memorandum was issued in anticipation of the repeal of DADT and instructed the Board to expect a large number of applications from “former service members discharged under DADT or prior policies.” This suggests the DADT repeal made discharge upgrades available to veterans regardless of discharge dates.

The applicant’s complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

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

On 24 Feb 61, according to NA Form 13038, *Certification of Military Service*, provided by the applicant, he was discharge from the Air Force with an Under Dishonorable Conditions service characterization.

According to Veterans Administration Memorandum, dated 4 Aug 61, the applicant was separated from the Air Force on 24 Feb 61, because of homosexual acts. His service was characterized as Under Dishonorable Conditions.

According to National Personnel Records Center letter, dated 12 May 16, provided by the applicant, his records are not in their files and may have been destroyed during the 12 Jul 73 facility fire.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits E and G.

## **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**

The Board sent a copy of the DoD policy to the applicant on 16 Nov 22 for comment (Exhibit D) but has received no response.

## **APPLICABLE AUTHORITY/GUIDANCE**

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 paragraphs 6 and 7 of the Wilkie Memorandum.

## **AIR FORCE EVALUATION**

AFPC/JA recommends granting the application. The evidence in the record shows the applicant was discharged based on alleged homosexual activity, and there are no aggravating factors in the record.

On 10 Sep 11, the Under Secretary of Defense issued guidance in concert with the repeal of “Don’t Ask, Don’t Tell (DADT).” This guidance stated that requests should normally be granted to change the narrative reason for a discharge, re-characterize discharges to honorable, and/or to change the reentry code when both of the following conditions are met:

- (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.

The applicant entered active duty on 6 Feb 58 and was separated from the Air Force, on 24 Feb 61, with a characterization of Under Dishonorable Conditions for “homosexual acts.” The applicant provided an Adjudication Memorandum, dated 4 Aug 61, which states he was discharged “because of homosexual acts.” There is no evidence of any misconduct during the applicant’s service. The applicant’s personnel records were lost in a fire at the NPRC in 1973, and the applicant provided a letter from the NPRC addressing the destruction of his records. The applicant also provided a sworn statement, in which he stated he was never disciplined, never used drugs, was never absent without leave, and “was performing adequately enough that I was not counseled or reprimanded.”

Additionally, in an advisory dated 7 Jul 22, AFPC/DP2SSR recommended changing the narrative reason for the applicant’s discharge to “Secretarial Authority”, the character of service to honorable, and the Reentry Code to 1J.

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 19 Dec 22 for comment (Exhibit F) but has received no response.

## **AIR FORCE EVALUATION**

AFPC/DP2SSR recommends granting the application, in accordance with repeal of DADT, to change the Narrative Reason for Separation/Separation Code to reflect "Secretarial Authority", Character of Service to honorable, and Reentry Code to 1J. Though there was very little documentation in the applicant's record, the advisor was able to gather information showing the applicant served from 6 Feb 58 to 24 Feb 61, as well as retrieve additional data via computer systems, and will be able to produce a functional DD Form 214 for the applicant's use.

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 25 Jan 23 for comment (Exhibit H) 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. The Board concurs with the rationales and recommendations of AFPC/JA and AFPC/DP2SSR, and recommends relief based on the repeal of 10 U.S.C. § 654. The 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.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the DD Form 214, *Certificate of Release or Discharge from Active Duty*, issued on 24 February 1961, be amended to reflect he was discharged with service characterized as honorable, a Separation Code of JFF, a Narrative Reason for Separation of Secretarial Authority, and a Reentry code of 1J.

## **CERTIFICATION**

The following quorum of the Board, as defined in the Department of the Air Force Instruction D(AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-00891 in Executive Session on 22 Mar 23:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 14 Mar 22.

- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: DoD Policy on Correcting Military Records after Repeal of DADT, 20 Sep 11.
- Exhibit D: Notification of DoD Policy, SAF/MRBC to applicant, dated 16 Nov 22.
- Exhibit E: Advisory Opinion, AFPC/JA, dated 19 Dec 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 19 Dec 22.
- Exhibit G: Advisory Opinion, AFPC/DP2SSR, dated 7 Jul 22.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Jan 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.

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Board Operations Manager, AFBCMR