



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01382

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHCD) discharge 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 discharged due to being homosexual under Don't Ask Don't Tell (DADT) and requests an upgrade to honorable for his officer service. He served honorably for his enlisted time on active duty and with the Air National Guard. After his discharge, he did not pout, he graduated law school, and he has been a practicing attorney for 22 years. He needs his discharge upgraded to be eligible for Department of Veterans Affairs (DVA) medical benefits.

In support of his request, the applicant provides copies of military kudos, various military records, letters of support, circa 1996, and a DVA claim form.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force second lieutenant (O-1).

On 22 Feb 96, the applicant was charged with the following violations:

Charge I: Violation of the Uniform Code of Military Justice (UCMJ), Article 125

Specification: On 27 Jan 96, the applicant committed sodomy with another man.

Charge II: Violation of the UCMJ, Article 133

Specification: On 27 Jan 96, the applicant placed his penis in the mouth of another man while in a public restroom, which, under the circumstances, constituted conduct unbecoming an officer and gentleman.

On 5 Apr 96, the Staff Judge Advocate found no significant legal issues that would preclude referring the charges and specifications to trial by general court-martial.

AFBCMR Docket Number BC-2022-01382

Work-Product

Work-Product

On or about 8 Apr 96 the applicant was referred to trial by general court-martial for one specification of sodomy in violation Article 125, UCMJ, and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ.

On 15 Apr 96, the applicant tendered his resignation for the good of the service due to facing trial by court-martial and acknowledged he would receive a UOTHC discharge unless the Secretary of the Air Force (SAF) determined he was entitled to be honorably discharged or discharged under honorable conditions (general).

On 30 Jul 96, the SAF accepted the applicant's resignation and directed the applicant be discharged with a UOTHC service characterization and recoupment of the cost of any education assistance, special pay, or bonus money received.

On 15 Aug 96, the applicant received a UOTHC discharge with a separation code and corresponding narrative reason for separation of DFS, *Triable by Court-Martial*. He was credited with 10 months and 25 days active service this period and 4 years, 2 months and 18 days of prior active service.

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

POST-SERVICE INFORMATION

On 8 Jan 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI) for consideration under clemency/fundamental fairness; however, he has not replied.

APPLICABLE AUTHORITY/GUIDANCE

On 20 Sep 11, with the repeal of the law commonly known as 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." In addition, 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. Finally, the issuance of a discharge under DADT or the taking of an action pursuant to DoD regulations related to a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus, remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separation pay to half or full separation pay or from half separation to full separation pay, would not normally be appropriate.

On 26 Jul 23, the Board staff provided the applicant a copy of the DoD policy (Exhibit C).

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, 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 Memo.

On 8 Jan 24, the Board staff provided the applicant a copy of the supplemental guidance (Exhibit F).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the member's service generally has met DAF 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.

General (Under Honorable Conditions). If a member's service has been honest and faithful, this characterization is warranted when negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record.

Under Other than Honorable Conditions (UOTHHC). This is used 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 members. 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 DAF.
- 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 abuse of a child, sexual harassment, and attempts to commit these offenses.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. There is insufficient evidence to demonstrate a material error or injustice. The applicant resigned for the good of service, in lieu of facing trial by court-martial, resulting in his discharge with a UOTHHC service characterization. The offense of consensual sodomy was repealed by the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1707(a), 127 Stat. 672, 961 (2013). However, the applicant was also charged with conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ. A liberty

interest protected by the constitution may be implicated when a person engages in *private*, consensual sexual activity. *See, e.g., United States v. Timsuren*, 72 M.J. 823, 826 (A.F. Ct. Crim. App. 2013). The evidence underlying this offense involved the applicant engaging in sex acts in a public restroom. This misconduct is an aggravating factor. Disciplinary action would be appropriate at present, just as it would be if DADT were in effect, and without regard to sex, gender, or sexual orientation. As a result, the applicant's discharge was not "based solely on DADT or a similar policy in place prior to enactment of DADT," per the Stanley memorandum. Put differently, the applicant's discharge with a UOTH service was not based merely on his sexual orientation. The presence of an aggravating factor makes upgrade of the applicant's service characterization inapt.

Furthermore, the applicant made misrepresentations and/or attempts of concealment in his application to the AFBCMR. Specifically, he implied in his 2022 application he was currently a practicing attorney, when he had not been for over two years and was in fact incarcerated following his pleas of guilty to serious crimes [against minors]. It would be disingenuous to not acknowledge this information factored into the legal advisory, despite his discharge from the Air Force in 1996 being a matter separate from his current circumstances. While this is not a clemency application where the applicant's post-discharge life is particularly relevant, it is an allegation of an injustice, for which is factored into the analysis not entirely dissimilar considerations. This is especially pertinent given the applicant is the one who invoked his post-discharge life, implying he made good following his discharge and is a member in good standing of the legal profession. Research revealed an entirely contrary truth. This reality, coupled with the applicant's dishonesty, are not matters AF/JAJI can turn a blind eye to. After a careful review, AF/JAJI finds no material error or injustice concerning the applicant's service characterization.

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 8 Jan 24 for comment (Exhibit E), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. While the applicant contends he was discharged due to his sexual orientation, the evidence indicates the discharge action was also the result of conduct unbecoming an officer, in violation of Article 133, UCMJ. Furthermore, the applicant submitted a request to resign for the good of the service, which was granted. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness under clemency; however, given the evidence presented, to include the applicant's post service serious crimes against minors, the Board finds no basis to do so. In view of the foregoing, and in the absence of evidence to the contrary, the Board recommends against correcting the applicant's record.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-01382 in Executive Session on 29 Feb 24:

Work-Product, Panel Chair

Work-Product, Panel Member

Work-Product, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 4 Apr 22.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (DoD Policy on Correcting Military Records after Repeal of DADT), dated 26 Jul 23.

Exhibit D: Advisory Opinion, AF/JAJI, w/atchs, dated 8 Jan 24.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Jan 24.

Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Supplemental Guidance), dated 8 Jan 24.

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.

2/6/2025

X Work-Pr...

Work-Product

Board Operations Manager, AFBCMR

Work-Product

AFBCMR Docket Number BC-2022-01382

Work-Product