

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-02322

XXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable, based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654).
2. Amend his separation date to reflect 1998, the date he would have separated had he not been discharged.
3. Furnish him with an Honorable Discharge certificate.

### APPLICANT'S CONTENTIONS

He is requesting his discharge be upgraded and his Department of Veterans Affairs (VA) benefits restored with regard to home ownership. He is merely seeking to obtain his right to a VA Home Loan Certificate of Eligibility. He requested his separation date be modified to indicate the date he would have separated from the Air Force had he not been discharged, 1998. Additionally, he requested an honorable discharge certificate to place on his wall as he planned to frame it along with the court order from the Honorable United States District Judge who overturned Don't Ask, Don't Tell (DADT) and Don't Pursue; they forgot the Don't Pursue part, literally. They were hunted down when found out and told if they did not give names, they would get an unhonorable [sic]; it was best to turn over names and they would be granted a general (under honorable conditions) discharge. His Area Defense Counsel did not understand it and said at his base they would have just given him an honorable discharge. He suspected because he was a Security Policeman, they were trying to prove a point to the rest of the Police Squadron – to knock it all off.

DADT has been ruled unconstitutional and violates the 1st and 5th Amendments of the United States of America Constitution. See *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011). See *Lawrence v. Texas*, 539 U.S. 558 (2003). See *Don't Ask, Don't Tell Repeal Act of 2010* (H.R. 2965, S. 4023). He did not know he could request an upgrade based on the repeal of DADT.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 20 Jul 94, according to DD Form 4, *Enlistment/Reenlistment Document Armed Forces of the United States*, the applicant enlisted in the Air Force for a period of four years.

On 23 Oct 95, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for Misbehavior of a Sentinel in violation of Article 113, UCMJ. He was reduced to the

rank of airman basic, suspended until 22 Apr 96, after which time it would be remitted without further action unless sooner vacated, and forfeited \$100 pay.

On 29 Nov 95, according to AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, the applicant's suspended reduction to the rank of airman basic was vacated for failure to go at the time prescribed to his appointed place of duty, in violation of Article 86, UCMJ.

On 27 Nov 95, a commander-direct inquiry into allegations of homosexual conduct by the applicant was completed and a report produced.

On 21 Dec 95, the applicant's commander recommended he be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, Section G, paragraphs 5.36.2.1. and 5.36.2.2., and Section H, paragraph 5.50.2.. The specific reasons for the action were: (1) Homosexual Conduct, and (2) Pattern of Misconduct.

On 1-2 Feb 96, an administrative discharge board was convened to determine if the applicant should be discharged. The discharge board recommended he be discharged from the Air Force for homosexual conduct, more specifically, a homosexual act under AFI 36-3208, Section G, paragraph 5.36.2.1. and for making a statement that he is a homosexual or bisexual under AFI 36-3208, Section G, paragraph 5.36.2.2., and a pattern of misconduct under AFI 36-3208, Section H, paragraph 5.50.2..

On 20 Mar 96, according to AF Form 1768, *Staff Summary Sheet*, the Staff Judge Advocate recommended to the discharge authority that the applicant be discharged, with a general discharge, without probation and rehabilitation.

On 22 Mar 96, the applicant received a General (Under Honorable Conditions) discharge. His reentry code is 2B, *Separated with a general or under-other-than-honorable-conditions discharge*, and his separation code and corresponding narrative reason for separation is HRA, *Homosexual Act*. He was credited with 1 year, 8 months, and 3 days of active service.

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

## **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." Additionally, 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.

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 21 Jun 23 for comment (Exhibit D) but has received no response.

### **FINDINGS AND CONCLUSION**

1. The application is timely.
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. While the Board finds no error in the original discharge process, the Board recommends partial relief based on the repeal of 10 U.S.C. § 654. The absence of aggravating factors pertaining to his sexuality in the applicant's record meets the criteria of the DoD policy on records correction following the repeal of DADT. However, the Board found his "pattern of misconduct" alone supported the general discharge characterization, based on his Article 15 and vacation of previously suspended nonjudicial punishment; therefore, a characterization change is not warranted. For the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice. Per DADT policy, correction of a record to reflect continued service is normally not appropriate, and the Board finds no basis to recommend granting that portion of the applicant's request. Therefore, the Board recommends correcting the applicant's records 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 from Active Duty*, issued in conjunction with his 22 Mar 96 discharge, be amended to reflect a Separation Code of JFF and a Narrative Reason for Separation of Secretarial Authority.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

### **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-02322 in Executive Session on 21 Sep 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/atch, dated 1 Sep 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 21 Jun 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