

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS****RECORD OF PROCEEDINGS****IN THE MATTER OF:****DOCKET NUMBER:** BC-2022-02649

Work-Product

COUNSEL: Work-Product**HEARING REQUESTED:** YES**APPLICANT'S REQUEST**

The following items on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654):

a. Item 4a, *Grade, Rate, or Rank*, be changed from captain to major.

b. Item 26, *Separation Code*, be changed from BRA to JFF.

c. Item 28, *Narrative Reason for Separation*, be changed from Homosexual Act to Secretarial Authority.

APPLICANT'S CONTENTIONS

Counsel on behalf of the applicant contends he is a decorated officer who honorably served for over ten years. The applicant was notified of his promotion from captain (O-3) to major (O-4) in Sep 01, with a promotion date in the fall of 02. He was discharged in Apr 02, before his promotion was officially conferred. His discharge was based solely on the Don't Ask, Don't Tell (DADT) policy, which was initiated when a relative revealed to his commanding officer he was homosexual. The Department of Defense has adopted a policy that service members involuntarily separated under DADT should normally receive the requested corrections. It would be inequitable for his promotion to major not be reflected on his DD Form 214 as well as for markers related to sexual orientation to remain on his DD Form 214.

Counsel cites the following Military Correction Boards cases in which Boards have changed service member's ranks on their DD Forms 214. However, counsel states the applicant is aware his request differs from each one of the cited cases because his rank was not reduced as a result of the DADT discharge.

Army BCMR 2015015346 (1 Mar 17): The applicant's rank was reduced from private second class (E-2) to private first class (E-1) as a result of a discharge for homosexuality; the board recommended correcting her rank to private second class.

Army BCMR 2015016561 (29 Mar 17): The applicant's rank was reduced from specialist (E-4) to private first class (E-1) as a result of a discharge for homosexuality. The Board recommended restoring the rank to specialist.

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Air Force BCMR BC201304767 (7 Apr 20): The applicant did not present evidence he had been promoted and the Board found the allegation of denial of promotion due to sexual preference was totally speculative and devoid of any substantiating evidence.

Air Force BCMR BC202001172 (14 Oct 21): The applicant's status as a noncommissioned officer (NCO) was vacated solely based on DADT. The Board granted reinstatement of NCO status, with sergeant (E-4) documented on the DD Form 214.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Regular Air Force captain (O-3).

On 21 Nov 01, the wing commander initiated involuntary discharge action against the applicant under the provisions of AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*. The specific reason for the action was Homosexual Conduct.

On 11 Dec 01, the applicant submitted an unconditional offer to resign in lieu of further involuntary administrative discharge action. He requested his service be characterized as honorable.

On 21 Dec 01, the wing commander recommended approval of the resignation with the issuance of an honorable discharge.

On 7 Jan 02, the Judge Advocate found the discharge action legally sufficient.

On 11 Apr 02, the Secretary of the Air Force approved the resignation submitted by the applicant under the provisions of AFI 36-3207, *Separation of Commissioned Officers*, and directed an honorable discharge from the United States Air Force.

On 30 Apr 02, according to the DD Form 214, the applicant was honorably discharged in the rank of captain. His separation code and corresponding narrative reason for separation is BRA, *Homosexual Act*. He was credited with 10 years, 3 months, and 16 days of total active service.

On 2 Jul 02, the Secretary of the Air Force directed the applicant's name be removed from the Calendar Year 2001A (CY01A) major selection board.

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

DD Form 214, *Certificate of Release or Discharge from Active Duty*, Personnel Services Delivery Guide, Section E, Table 5, *How to Prepare the DD Form 214*. The active duty grade held at the close out date of the DD Form 214 will be placed in item 4a.

APPLICANT’S REVIEW OF APPLICABLE AUTHORITY/GUIDANCE

The Board sent a copy of the DoD to the applicant on 30 Jan 23, for comment (Exhibit D) but has received no response.

AIR FORCE EVALUATION

AFPC/DPMSPP (Officer Promotions) recommends denying the applicant’s request for a rank change. The applicant met the CY01A Line of the Air Force Central Selection Board (P0401A) and was selected for promotion to the rank of major. As a result of the DADT policy, the applicant was separated from the Air Force on 30 Apr 02. Despite the separation reason, the applicant separated from the Air Force prior to his line number incrementing, and as such, he never promoted to the rank of major.

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 counsel on 30 Jan 23 for comment (Exhibit F), and counsel replied on 15 Feb 23. In her response, counsel contends AFPC/DPMSPP confirms each of the facts that form the basis for the applicant’s request for correction of his DD Form 214. Consistent with the applicant’s affidavit and documentary evidence, the memorandum does not identify any information suggesting the applicant’s unblemished record of exemplary service would have ended during the few short months until his line number incremented. The recommendation also makes clear the sole reason the applicant was not in the Air Force when his line number incremented was because he was involuntarily separated as a result of the DADT policy. Had he merely been assigned an earlier line number, his rank would have been changed prior to his 30 Apr 02, separation, pursuant to DADT.

Counsel’s complete response is at Exhibit F.

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 the victim of an injustice. While the Board finds no error in the original discharge process, the Board 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. Accordingly, the Board recommends correcting the applicant's separation code and corresponding reason for separation.
4. Notwithstanding, regarding the applicant's request to change the rank on his DD Form 214 from captain to major, the evidence presented did not demonstrate an error or injustice. While counsel cited numerous Correction Board cases in which Boards changed service members' ranks on their DD Forms 214; these cases were different than the applicant's case because in the cited cases, the ranks were reduced because of the DADT discharge. In the applicant's case, he was promoted to the rank of major; however, he was discharged prior to his rank incrementing. Therefore, as noted above, the applicant's rank at the time of his discharge is correctly reflected on his DD Form 214. Counsel concedes the applicant is aware his request differs from each one of the cited cases because his rank was not reduced as a result of the DADT discharge. Nevertheless, counsel contends service members involuntarily separated under DADT should normally receive the requested corrections pursuant to DoD policy following the repeal of DADT. However, the Board disagrees. 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 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 or restoration to a previous grade or position would not normally be appropriate. Therefore, in view of the forgoing, the Board concurs with AFPC/DPMSPP and finds a preponderance of the evidence does not substantiate the applicant's contentions regarding the request to change the rank on his DD Form 214. Accordingly, the Board recommends against correcting this portion of the applicant's request.

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*, be amended to reflect he was discharged with a Separation Code and corresponding Narrative Reason for Separation of JFF, *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-2022-02649 in Executive Session on 15 Jun 23:

- Work-Product**, Panel Chair
- Work-Product**, Panel Member
- Work-Product**, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 26 Sep 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: DADT Under SECDEF Letter, dated 20 Sep 11.
- Exhibit D: Notification of DoD Policy, SAF/MRBC to Applicant, dated 26 Oct 22.
- Exhibit E: Advisory Opinion, AFPC/DPMSPP, dated 30 Jan 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 30 Jan 23.
- Exhibit G: Counsel's Response, dated 15 Feb 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.

8/15/2023

Work-Product

Board Operations Manager, AFBCMR

Work-Product