

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02989

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXX

HEARING REQUESTED: NOT INDICATED

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. His Narrative Reason for Separation be changed from Homosexual Act to Secretarial Authority.
3. His Separation Code be changed from ¹GRA to ²JFF.
4. His Reentry Code be changed from ³2B to ⁴1J.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends the sole basis for his discharge was the then-existing Department of Defense (DoD) policy concerning homosexuality and homosexual acts. The applicant had not been subject to any discipline or accused of any wrongdoing before his discharge. He enlisted in the Air Force to serve his country and because the Air Force would provide him an opportunity to pursue a college education. At the time of his discharge, he was in training to become a radio technician.

He is a homosexual man, but not openly when he served. While in the Air Force he believes others concluded he was homosexual because of his mannerisms and the people with whom he would socialize. On an evening in the spring of 1995, he and a fellow Airman were watching a movie in their Air Force dormitory when officers entered and brought the applicant and the other Airman into separate rooms. Once separated, the officers presented him with evidence that he was homosexual, including the fact that he had visited bars associated with the gay community. His discharge took effect on 25 May 95, and his DD Form 214, *Certificate of Release or Discharge from Active Duty*, lists his character of service as general (under honorable conditions); the narrative reason "Homosexual Acts"; the Separation Code "GRA"; and the Reentry Code "2B."

Since his time in the Air Force, the applicant has demonstrated a strong character and his desire to serve others. He works in the healthcare industry, and volunteers with organizations promoting animal welfare, LGBTQ issues, and the Make-a-Wish Foundation. Just as he had no legal issues during his Air Force career, he has had none since.

At the time of his service, the policy known as "Don't Ask, Don't Tell" (DADT) was in effect, which allowed servicemembers to be discharged due to homosexuality or engaging in

¹ GRA, Homosexual Act

² JFF, Secretarial Authority

³ 2B, Separated with a general or under-other-than-honorable-conditions discharge.

⁴ 1J, Eligible to reenlist, but elects separation.

homosexual acts. Since DADT was repealed, the DoD has issued guidance to review boards and Service Boards for Correction of Military Records to guide their consideration of requests based upon DADT's repeal, referred to as the Stanley Memo [dated 20 Sep 11]. The Stanley Memo recognizes DoD's position that applications of this kind are unique. By issuing the Stanley Memo, and broadly stating that review boards should "normally grant" applications stemming from the repeal of DADT or similar prior policies, the DoD indicated its position that granting these applications is, in itself, in the interests of justice. There is no question the applicant's discharge was based solely on DADT, with the Narrative Reason for Separation on his DD Form 214 reflecting "Homosexual Acts" and the Separation Code "GRA" which is the code for "Homosexual Conduct (Acts)." That the applicant had no prior history of disciplinary or legal issues during his service places his application squarely in the scope of the Stanley Memo's first prong. His application also falls within the Stanley Memo's second prong. There are no aggravating factors in his record, such as misconduct that might weigh against his requested relief. There are ameliorating factors which demonstrate relief is appropriate. Following his discharge, he continued to demonstrate strong character, has had no legal trouble, is employed in the healthcare industry, and volunteers for worthwhile causes in his community.

In the Wilkie Memo [dated 25 Jul 18], DoD provided guidance on twelve factors the Air Force Board for Correction of Military Records (AFBCMR) "shall consider" when "determining whether to grant relief on the basis of...an injustice." Relevant factors within this memo support the applicant's requested relief.

The applicant has exhausted his available administrative remedies. Because he was discharged in 1995, the 15-year statute of limitations for him to apply to the Air Force Discharge Review Board had expired, and he must apply to the AFBCMR for the requested relief.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 8 May 95, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.36., *Homosexual Conduct*.

On 19 May 95, the Staff Judge Advocate found the discharge action legally sufficient.

On 24 May 95, the discharge authority directed the applicant be discharged pursuant to AFI 36-3208, Chapter 5, Section G, paragraph 5.36.2., with a general service characterization. The applicant was not eligible for probation and rehabilitation.

On 25 May 95, the applicant received a general (under honorable conditions) discharge. His Reentry Code is 2B, and his separation code and corresponding Narrative Reason for Separation is GRA, *Homosexual Act*. He was credited with 9 months and 1 day of total active service.

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

APPLICABLE AUTHORITY/GUIDANCE

On 25 Jul 18, the Under Secretary of Defense 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 the supplemental guidance, paragraphs 6 and 7.

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, dated 20 Sep 11, is at Exhibit C.

APPLICANT’S REVIEW OF APPLICABLE AUTHORITY/GUIDANCE

The Board sent a copy of the DoD policy, dated 20 Sep 11 to the applicant on 28 Feb 23 for comment (Exhibit D) 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. 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. Therefore, the Board recommends correcting the applicant’s record.
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 in conjunction with his 25 May 95 discharge, 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 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-2022-02989 in Executive Session on 6 Jul 23:

, Chair, AFBCMR
, 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 26 Oct 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 counsel, dated 28 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.

X

Board Operations Manager, AFBCMR