

Work-Product

Work-Product

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02999

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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).

APPLICANT'S CONTENTIONS

His active duty service was during the "Don't Ask, Don't Tell" (DADT) policy. In 1990, he was involuntarily discharged from the Air Force for "homosexuality acts." The Air Force has since repealed that policy.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 14 Dec 87, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant entered the Regular Air Force in the rank of airman first class, for a period of four years.

On 27 Jul 88, according to AF Form 174, *Record of Individual Counseling*, the applicant was counseled for writing two checks, which were returned for insufficient funds.

On 6 Sep 88, the applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice for insufficient funds/failure to pay debts. As punishment he was sentenced to 22 days of correctional custody.

On 16 Nov 88, the applicant received a letter of reprimand for entering two dormitory rooms on/ or about 23 Oct 88, without the permission of the occupants. The applicant acknowledged receipt of the letter of reprimand on 17 Oct 88.

On 10 Mar 89, the applicant received a letter of reprimand for issuing a check in the amount of \$35 with insufficient funds. On 10 Mar 89, the applicant acknowledge receipt of the letter of reprimand.

On 10 Mar 89, according to AF Form 1058, *Unfavorable Information File Action*, the applicant was informed the letter of reprimand would be placed in his existing unfavorable information file and he would be placed on the control roster.

AFBCMR Docket Number BC-2022-02999

Work-Product

Work-Product

On 8 Mar 90, the Office of Special Investigations (OSI) initiated an investigation into the applicant based on allegations of Indecent Acts (homosexual activity).

On 19 Apr 90, the applicant's commander notified the applicant he was recommending he be discharged with a general (under honorable conditions) service characterization for Homosexuality in accordance with Air Force Regulation 39-10, *Administrative Separation of Airmen*, Section G, Paragraph 5-35. The specific reasons for this action were: (1) Between Apr 88 and Dec 89, he entered the dormitory rooms of other male Airmen while they were asleep and attempted to sleep in the same bed; and (2) on one occasion between Mar 88 and Dec 88, he fondled the genitals of another Airmen.

On 11 May 90, the Judge Advocate found the discharge recommendation legally sufficient and supported the commander's recommendation the applicant be discharged with a general characterization, without probation and rehabilitation.

On 23 May 90, the applicant acknowledged receipt of the discharge notification and offered an unconditional waiver of the rights associated with an administrative discharge board (ADB) hearing contingent upon receiving no less than an honorable discharge. He further acknowledged that he understood that if the separation authority approved the recommendation for his discharge that they would also determine the type of discharge to be issued to him. In support of his request, the applicant provided a letter of appreciation dated 7 Feb 89, for his outstanding customer service.

On 1 Jun 90, the Judge Advocate performed a supplementary review based on further developments since their 11 May 90 review and concluded the initial review remained legally sufficient. Following the discharge authority's rejection of the applicant's offer to waive his right to an ADB hearing, conditioned on his receipt of an honorable discharge, the applicant submitted an unconditional waiver of his right to an ADB hearing. The discharge authority was informed three types of discharge were authorized for cases processed under AFR 39-10, paragraph 5-35. These characterizations are honorable, general or under other than honorable conditions (UOTHC). A UOTHC discharge may only be given if during the current term of enlistment the applicant attempted, solicited, or committed a homosexual act: (1) by using force, coercion, or intimidation; (2) with a person under 16 years of age; (3) with a subordinate in circumstances that violate customary military superior-subordinate relationships; (4) openly in public view; (5) for compensation; (6) aboard a military vessel or aircraft; or (7) in another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft. Factors 1-6 were not present in this case. The evidence indicates the applicant entered the dormitory rooms of other military members while they were asleep and entered their beds. Though a military member entering the beds of other military members that had not consented to such behavior adversely affects discipline, good order and morale, such impact is not likely comparable to similar activity aboard a vessel or aircraft. Close examination of the facts in light of the language factor in item (7) indicates a UOTHC discharge under this factor would not be authorized.

Further, since the notification letter does not inform the applicant a UOTHC discharge may be given, if the discharge authority concludes, contrary to the foregoing analysis, that circumstances warrant a UOTHC discharge, the case should be returned to the unit commander for further processing.

On 13 Jun 90, according to DD Form 214, the applicant received a general (under honorable conditions) discharge. His separation code and corresponding narrative reason for separation is GRA, *Homosexual Acts*, and his reentry code is 2B, *Discharged under general or other than*

honorable conditions. He was credited with 2 years and 6 months of total active service. Item 13, *Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized*, reflects: Air Force Training Ribbon; USAF Basic Military Training Honor Graduate Ribbon; Small Arms Expert Marksmanship Ribbon – Rifle; Air Force Overseas Ribbon – Long.

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

APPLICABLE AUTHORITY/GUIDANCE

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the types of service characterization:

Honorable. The quality of the Airman's service generally has met Air Force 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.

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

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/GUIDANCE

The Board sent a copy of the DoD policy to the applicant on 10 Mar 23 for comment (Exhibit D) but has received no response.

AIR FORCE EVALUATION

AFPC/JA (Enlisted Personnel Law) recommends denying the application. The applicant was separated pursuant to AFR 39-10, paragraph 5-35(a) for engaging in a consensual homosexual act with another male Air Force member and for entering into the dormitory rooms of other Air Force members while they were asleep and attempting to sleep in the same bed with them. The applicant was notified of his rights to an ADB, to submit evidence, and to be represented by counsel. The applicant submitted a conditional waiver of the board contingent upon his receipt of an honorable service characterization, which was rejected. The applicant resubmitted an unconditional waiver,

it was accepted, and the applicant was separated with a general (under honorable conditions) characterization. The servicing legal office reviewed the discharge package and found it legally sufficient under the law and policies at that time.

In this case, the applicant's request falls outside of the Secretary of Defense post-DADT guidance because it involved aggravating factors. While one of the acts cited in the discharge notification involved consensual homosexual touching, the casefile cited several other incidents where the applicant entered sleeping Airmen's dorm rooms without permission and sat on their beds, sat in chairs, and watched them sleep, and attempted to sleep in the bed with them. At least one Airman reported waking to the applicant in his bed rubbing his (the Airman's) back. The record is clear the applicant engaged in several instances of unlawful entry into the rooms of sleeping male Airmen and in some instances touched them. Such misconduct, even when viewed through the lens of federal criminal statutes at the time, could have amounted to criminal sexual abuse. Therefore, because the discharge was based at least in part on non-consensual homosexual acts rather than solely on a DADT-like policy with no aggravating factors, the Secretary of Defense guidance is not applicable.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the AFPC/JA advisory to the applicant on 9 Jul 21 for comment (Exhibit E) 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. As indicated in the advisory from AFPC/JA, since the applicant's record includes aggravating factors pertaining to his sexuality, his case fails to meet the criteria of the DoD policy on records correction following the repeal of DADT. The aggravating factors include several instances of unlawful entry into the rooms of sleeping male Airmen and in some instances touching them. Applicant's record indicates he received nonjudicial punishment, letters of reprimand, unfavorable information file and control roster action. The Board found his misconduct alone supports the general service characterization; therefore, a change to his characterization is not warranted. However, due to the repeal of 10 U.S.C. § 654, the applicant's narrative reason for discharge, listed as "Homosexuality Acts," should be changed to remove the reference to homosexuality to protect his privacy. Accordingly, the Board recommends correcting the applicant's records as indicated below.

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 13 Jun 90 discharge, be amended to reflect 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-02999 in Executive Session on 19 Oct 23:

Work-Product, Panel Chair

Work-Product, Panel Member

Work-Product, Panel Member

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

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

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

Exhibit C: DoD Policy on Correcting Military Records after Repeal of DADT, dated 20 Sep 11.

Exhibit D: Notification of DoD Policy, SAF/MRBC to applicant, dated 10 Mar 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.

1/31/2025

X Work-Product

Work-Product

Board Operations Manager, AFBCMR

Signed by: Work-Product

AFBCMR Docket Number BC-2022-02999

Work-Product