

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03193

XXXXXXXXXXXXXX

COUNSEL: NONE

(AKA) XXXXXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended as follows:

- a. Item 1, *Name*: Reflect her current legal name.
- b. Item 24, *Character of Service*: Uncharacterized to Honorable.
- c. Item 26, *Separation Code*: HRA¹ to MBK².
- d. Item 27, *Reentry Code*: from 2C³ to IJ⁴
- e. Item 28, *Narrative Reason for Separation*: Homosexual Act to Completion of Required Active Service.
- f. Item 12b. *Separation Date This Period*: 1999 Sep 17 to 2001 Feb 25.

APPLICANT'S CONTENTIONS

She was a respected and hard-working Airman who excelled at Basic Training and Technical School and was excited to begin her career in the Air Force. Unfortunately, she was targeted, isolated, and investigated for being a homosexual. Despite accolades and hard work, she was given an administrative discharge on 17 Sep 99, citing homosexual acts as the narrative reason for her separation. During this challenging time, the Air Force offered her two terrifying options, neither of which would allow her to continue serving her country. The Air Force told her she could go before a board, with media present, and likely receive an under other than honorable conditions discharge, or she could waive her rights and receive a less punitive discharge without the media attention. She chose the latter to keep her sexual orientation from becoming public knowledge and damaging her any more than it already had. Being gay during this time was unsafe, and the fear of never gaining or maintaining employment based on her sexual orientation going public was debilitating. She did not know then that her DD Form 214 would plague her regardless of which option she chose by listing homosexuality as the reason for her discharge.

Through the repeal of Don't Ask, Don't Tell (DADT) on 20 Sep 11, the government has acknowledged that an Airman's sexual orientation has no bearing on their fitness for military service and consensual sexual activity between members of the same sex no longer constitutes valid grounds for discharge. In light of this shift in military policy, she is requesting correction of her military records. Without this remedy, she will continue to be barred from accessing most Veterans Administration (VA) benefits due to being discharged before the minimum 24 months of continuous active duty according to Title 38, Code of Federal Regulations, Section 3.12a (38 CFR 3.12a). In addition, because she was discharged in 1999, the 15-year statute of limitations to apply to the Air Force Discharge Review Board expired 3 years after the repeal of DADT.

¹ HRA: Homosexual Act

² MBK: Completion of Required Active Service

³ 2C: Involuntarily separated with an honorable discharge; or entry level separation without characterization of service.

⁴ IJ: Eligible to reenlist, but elects separation.

She has exhausted all other remedies and must apply to the Air Force Board for Correction of Military Records (AFBCMR) for the requested relief.

Several factors support that it is in the interest of justice to allow her application to proceed. The Stanley Memorandum⁵ explains that the repeal of DADT is not a reason in itself to invalidate a discharge, on the other hand, the repeal of DADT is sufficient to change the narrative reason and request a change to the reentry code to allow immediate reenlistment. This same error or injustice is sufficient to excuse any lack of timeliness. According to the Stanley Memorandum, the Board should change her characterization of service, reentry code, the narrative reason for discharge, separation code, separation authority, and when warranted, amend length of service. Further, the Wilkie Memorandum⁶ instructs the Board that flawless service devoid of any misconduct is not required for an honorable discharge characterization. These changes serve the interest of justice and will ensure her discharge paperwork reflects the current policy of the Department of Defense and the Armed Forces after the repeal of DADT.

In Jun 99, she was assigned as a Base Operator and was assigned a sponsor to assist in her acclimation to her new role. Her sponsor, another female Airman, spent a couple of weeks showing her around the base, completing her intake requirements, and assisting with her orientation into her military role. In Jul 99, her sponsor came to her dormitory room to invite her to a party. The sponsor was intoxicated and pulled her toward the bathroom, pushed her against the wall, and kissed her. She was shocked and immediately concerned for her safety, so she froze and did not stop the other female Airman. She was already struggling to identify her sexual orientation, yet afraid to discover herself while serving a country that hunted her before she knew herself. She was paralyzed in fear, and it was that fear that allowed her sponsor to take advantage of her inferiority and prey on her fear. Eventually, the kiss turned sexual, and she still froze in silence. Her sponsor knew she could not speak about what was happening and DADT allowed predators to use the threat of discharge to prey on the young and vulnerable. She did not know what to say or do, and there was nowhere safe to seek refuge and support.

In Aug 99, her sponsor informed her that she [Sponsor] was forced to tell the first sergeant that she [Applicant] was a lesbian. Upon being asked why she did this, the sponsor said the first sergeant accused her [Sponsor] of being a lesbian and someone would have to answer to these accusations. The sponsor felt pressured to take the heat off herself, so offered up her [Applicant] name. On or about 2 Aug 99, she was directed to report to the base commander who notified her she was under investigation for being a homosexual. She was placed on restricted duty and told not to discuss the investigation. She was forced to speak of highly personal, private, and intimate parts of her sex life under the guise that her cooperation would ease her pending punishment. As a result, she was administratively discharged, under uncharacterized conditions, based solely on her sexual orientation. At the time of discharge, she had completed 6 months and 24 days of active service and allowed no more.

The only stated reason for the investigation into her conduct was that she was suspected of sexual acts with another person of the same sex. After her admission to engaging in sexual acts with another person of the same sex, she was informed she would receive an administrative discharge. The administrative board recommended "homosexual acts" and no other reasons, that she should be separated with an uncharacterized discharge. She displayed an outstanding performance record and her actions with another service member do not rise to the level of an aggravating factor. Her acts with another service member did not involve a superior-to-

⁵ Refers to Under Secretary of Defense memorandum, Subject: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code, dated 20 Sep 11, and signed by The Honorable Clifford L. Stanley.

⁶ Refers to Under Secretary of Defense memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations, dated 25 Jul 18, and signed by The Honorable Robert L. Wilkie.

subordinate relationship and would not have violated the Air Force's fraternization policy. At the time of discharge, she served 205 days and was allowed no more. She was discharged within her first year and 38 CFR 3.12a continues to be an unjust and inequitable statutory bar to her ability to access her earned VA benefits.

Although the Board must evaluate requests on a case-by-case basis, it must adhere to its precedents on adjudicating cases before it. The Board granted relief where a male petitioner engaged in homosexual conduct with a fellow service member on multiple occasions for over a year. The Board found that although the conduct in question likely occurred in a location subject to military control and may have impacted good order and discipline, the conduct did not rise to the level of aggravating factors. Accordingly, the Board should determine, as it did in Docket Number 3459-16⁷, that her conduct did not rise to the level of an aggravating factor. Further, the Wilkie Memorandum provides general principles the Board should consider in its evaluation, such as her candor while under great distress and duress, and in her adolescent attempt to keep her sexual orientation from becoming public knowledge, when admitting to kissing the other female Airman. Considering the severity of the conduct, the Board should note her acts were consensual, did not result in nonjudicial punishment, and did not involve fraternization.

Finally, not only did her discharge cut short her Air Force career, but it also prevented her from pursuing other viable careers. As a result of the shame of her designation and the collateral consequences, she continues to suffer chronic depression and Post Traumatic Stress Disorder for the rest of her life. She commanded the respect of her peers and superiors. Given her word, and otherwise impeccable service record, it is more likely than not she would have continued to serve her country honorably as she desperately wanted. In this case, the punishment did not fit the conduct and she has paid for her sexual orientation many times over.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1) who served in the Air Force under the name XXX.

On 24 Feb 99, according to DD Form 214, the applicant entered the Regular Air Force.

On 1 Jul 99, according to a Commander Directed Report into Alleged Homosexual Conduct, dated 13 Jul 99, an investigating officer was appointed to investigate the alleged homosexual misconduct of the applicant. The investigating officer recommended a general discharge on the grounds of propensity or intent to engage in homosexual acts.

On 10 Aug 99, the applicant's commander notified her he recommended she be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.36., *Homosexual Conduct*. The specific reason for the action was an Airman indicated the applicant was a homosexual and made advances. The commander stated he would recommend she receive an entry level separation.

On 15 Aug 99, the applicant acknowledged receipt of the discharge notification and indicated she did not waive her right to a hearing before an administrative discharge board, did not waive her right to military counsel, and would submit statements on her behalf.

⁷ Refers to redacted Memorandum from Chairman, Board for Correction of Naval Records to Secretary of the Navy, dated 14 Apr 17, Subject: Review Naval Record of [redacted], Docket No. 3459-16, provided by the applicant.

On 7 Sep 99, according to a memorandum to the separation authority, the applicant indicated her desire to serve in the Air Force; however, the current policy prevents her and other highly qualified people from doing so.

On 10 Sep 99, the Staff Judge Advocate found the discharge action legally sufficient and recommended the applicant be separated in accordance with AFI 36-3208, Chapter 5, Section G, paragraph 5.36.1, *Homosexual Conduct*, with an entry level separation.

On 17 Sep 99, the applicant received an entry level separation with uncharacterized service. Her separation code and corresponding narrative reason for separation is HRA, *Homosexual Act*, and her reentry code is 2C. She was credited with 6 months and 24 days of active service.

On 1 Jul 09, according to a County Name Change Order, provided by the applicant, her name was changed from XXX to XXX.

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

APPLICABLE AUTHORITY/GUIDANCE

Department of Defense Instruction (DoDI) 1336.01, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*. The Department of Defense authorizes six characterizations of service for military service members to receive on discharge: (1) Honorable; (2) Under Honorable Conditions (General); (3) Under Other than Honorable Conditions; (4) Bad Conduct; (5) Dishonorable, and (6) Uncharacterized.

AFI 36-3208, *Administrative Separation of Airmen*, dated 14 Oct 94. Airmen are in entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active military service after a break of more than 92 days of active service. Individuals in an entry level status will separate without service characterization. Determine the member's status by the date of notification; thus, if the member is in entry level status when initiating the separation action, describe it as an entry level separation⁸ unless: A service characterization of under other than honorable conditions is authorized under the reason for discharge and is warranted by the circumstances of the case; or the Secretary of the Air Force determines, on a case-by-case basis, that characterization as honorable is clearly warranted by unusual circumstances of personal conduct and performance of military duty.

The separation authority will forward a recommendation for an honorable characterization to HQ AFMPC/DPMARS2, 550 C Street West, Ste 11, Randolph AFB TX 78150-4713, for review and further processing. Use this characterization if the reason for separation is: A change in military status according to chapter 2; or for the convenience of the government according to chapter 3; or for disability according to AFI 36-2902 (formerly AFR 35-4); or directed by the Secretary of the Air Force according to paragraph 1.2.

Title 38 United States Code, Section 3.12a (38 U.S.C. § 3.12a): *Minimum active-duty service requirement*.

(a) Definitions.

(1) The term minimum period of active duty means, for the purposes of this section, the shorter of the following periods.

⁸ The applicant served on Active Duty for 167 days before discharge action was initiated.

(i) Twenty-four months of continuous active duty. Non-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see § 3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served.

(ii) The full period for which a person was called or ordered to active duty.

Effect on Department of Veterans Affairs benefits. Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under Title 38 United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.

(c) Persons included. Except as provided in paragraph (d) of this section, the provisions of paragraph (b) of this section apply to the following persons:

(1) A person who originally enlists (enlisted person only) in a regular component of the Armed Forces after 7 Sep 80 (a person who signed a delayed-entry contract with one of the service branches prior to 8 Sep 80, and under that contract was assigned to a reserve component until entering on active duty after 7 Sep 80, shall be considered to have enlisted on the date the person entered on active duty); and

(2) Any other person (officer as well as enlisted) who enters on active duty after 16 Oct 81 and who has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under 10 U.S.C. § 1171 (early out).

(d) Exclusions. The provisions of paragraph (b) of this section are not applicable to the following cases:

(1) To a person who is discharged or released under 10 U.S.C. §1171 or §1173 (early out or hardship discharge).

(2) To a person who is discharged or released from active duty for a disability adjudged service connected without presumptive provisions of law, or who at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(3) To a person with a compensable service-connected disability.

(4) To the provision of a benefit for or in connection with a service-connected disability, condition, or death.

(5) To benefits under chapter 19 of Title 38 U.S.C.

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.

Air Force policy does not authorize the correction of records of former Airmen to show name changes occurring after discharge (AFI 36-2608, *Military Personnel Records System*, Table A7.3 [Name Changes]). In particular, if the name appearing on the DD Form 214 was correct at the time it was created, the AFI would not allow a correction, even to reflect a subsequent, legal name change. The past practice of the Board has been to follow the AFI in all cases except those where the applicant seeks to revert to either a maiden name or the name under which he or she entered service, or the Board finds a particular injustice that warrants an exception to policy, such as noted below in the SAF/MR memorandum.

SAF/MR memorandum, *Guidance to the Air Force Board for Correction of Military Records*, dated 9 Mar 15, states that while the Board generally has the authority to correct an applicant's records to reflect a legal change to the applicant's name, it should exercise discretion in doing so. The DD Form 214 is primarily created for the benefit of the veteran to establish entitlements to various government programs, or in seeking employment with organizations that grant veteran's preferences. A DD Form 214 may constitute an injustice when the veteran asserts that presenting a DD Form 214 that lists the old name effectively requires a needlessly intrusive explanation of personal history. This type of injustice may arise in situations such as when the name change is transgender-related or associated with a divorce.

A complete copy of the SAF/MR memorandum is at Exhibit C.

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 "IJ." 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 E.

APPLICANT'S REVIEW OF APPLICABLE AUTHORITY/GUIDANCE

The Board sent a copy of the DoD policy to the applicant on 7 Jul 23 for comment (Exhibit F) but has received no response.

AIR FORCE EVALUATION

AFPC/DPMSSR (Military Retirements and Separations) recommends denying the applicant's request to amend her date of discharge. Based on review of the applicant's request and the

Master Personnel Record (MPR), no error or injustice with the discharge process was found. Review of the applicant's MPR showed the discharge authority directed separation upon review of the commander's recommendation for discharge. Once the discharge authority directed separation, the discharge is executed immediately, and the applicant would be separated within a matter of days. The date of separation listed on the DD Form 214 is correct and matches the date of separation in the military personnel database. Additional time on active duty not served in the Air Force cannot be granted for the purpose of any outside agency benefits.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 12 Jul 23 for comment (Exhibit H) 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 in part. 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 the applicant's separation code and narrative reason for separation be changed.

Notwithstanding, the Board finds insufficient evidence to warrant upgrading the applicant's entry level separation to an honorable discharge due to her limited active duty service (167 days when separation processing was initiated). In this respect, the Board finds the applicant's uncharacterized service based on entry level separation is correct according to DoDI 1332.14, *Enlisted Administrative Separations*. In addition, the Board concurs with the rationale and recommendation of AFPC/DPMSSR and finds a preponderance of the evidence does not substantiate the applicant's contentions regarding her request for additional service credit. In accordance with Under Secretary of Defense policy memorandum, dated 20 Sep 11, credit for time not served is not appropriate. Finally, the Board finds the applicant has not established that presenting DD Form 214 with her previous legal name effectively requires a needlessly intrusive explanation of personal history 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.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show DD Form 214, *Certificate of Release from Active Duty*, issued in conjunction with her 17 Sep 99 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 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-2022-03193 in Executive Session on 16 Nov 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/atchs, dated 6 Nov 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Memorandum, SAF/MR, dated 9 Mar 15.
Exhibit D: Notification of Memorandum, SAF/MRBC to Applicant, dated 7 Jul 23.
Exhibit E: DoD Policy on Correcting Military Records after Repeal of DADT, 20 Sep 11.
Exhibit F: Notification of DoD Policy, SAF/MRBC to applicant, dated 7 Jul 23.
Exhibit G: Advisory opinion, AFPC/DPMSSR, dated 7 Jul 23.
Exhibit H: Notification of advisory, SAF/MRBC to applicant, dated 12 Jul 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