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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00928

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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

He was a decorated airman, involved in honor guard, public speaking, and fitness monitoring during the time he was encouraged to separate from the service. While on active duty, he was under investigation for motorcycle theft, leaving base without a car, and damaging a military member's property. The charges were dropped after consulting with a family attorney and contacting his congressman. He was then advised by legal aide to voluntarily admit to being homosexual so he could be discharged based on his sexual orientation due to the recent events.

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 1 Oct 98, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFPD 36-32, *Military Retirements and Separations*, and AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.36.2.2, Homosexual Conduct, based on admission statements, dated 25 and 28 Sep 98. The applicant's commander also noted other derogatory data during his current enlistment that could be used to characterize his discharge and may also be considered in deciding whether he should be discharged or retained. The specific derogatory actions were:

a. On 5 Jan 98, he failed to obey a lawful general regulation and reported for duty with a haircut that did not comply with Air Force standards and displayed an unprofessional attitude toward a senior non-commissioned officer. As a result, he was counseled.

b. On 9 Jan 08, he was derelict in the performance of his duties and failed to give a pre-brief. As a result, he was counseled.

c. On 9 Jan 08, he behaved in a disrespectful manner toward a senior non-commissioned officer. As a result, he was counseled.

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d. On or about 4 Mar 98, he failed to pay a just debt to the First Bank Card Center. As a result, he was counseled.

e. On or about 19 Mar 98, he dishonorably failed to pay a just debt to Check Services. As a result, he was counseled.

f. On or about 20 Jun 98, and on or about 6 Jul 98, he wrote checks which were returned for insufficient funds. As a result, he was reprimanded.

On 16 Oct 98, the applicant offered a conditional waiver of his rights for an administrative discharge board hearing contingent on receipt of no less than an honorable discharge.

On 1 Nov 98, the Staff Judge Advocate recommended the applicant's conditional waiver be rejected.

On 2 Nov 98, the approval authority rejected the applicant's conditional waiver.

On 4 Nov 98, the applicant submitted an unconditional waiver of his right to an administrative discharge board hearing.

On 10 Nov 98, the applicant's commander recommended the applicant be discharged from the Air Force under the same provisions for homosexual misconduct with a general (under honorable conditions) service characterization.

On 10 Nov 98, the Staff Judge Advocate found the discharge action legally sufficient and recommended the applicant's unconditional waiver be accepted and he receive a general (under honorable conditions) discharge.

On 10 Nov 98, the discharge authority directed the applicant be discharged for homosexual conduct, with a general (under honorable conditions) service characterization. Probation and rehabilitation were not offered.

On 12 Nov 98, the applicant received a general (under honorable conditions) discharge. His separation code and corresponding narrative reason for separation is HRB, *Homosexual Admission*, and his reentry code is 2B, *Separated with a general or under-other-than-honorable conditions discharge*. He was credited with 1 year, 8 months, and 1 day of total active service.

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

POST-SERVICE INFORMATION

On 19 Dec 23, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI) for consideration under clemency/fundamental fairness; however, he has not replied.

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.” In addition, 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.

On 22 Sep 23, Board staff provided the applicant a copy of the DoD policy (Exhibit C).

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, 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 19 Dec 23, Board staff provided the applicant a copy of the supplemental guidance (Exhibit F).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the airman’s service generally has met Department of the 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.

General (Under Honorable Conditions). 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 member’s military record.

AIR FORCE EVALUATION

AFPC/JA (Enlisted Personnel Law) recommends partially granting the application and change the narrative reason for separation to “Secretarial Authority” and deny upgrading the service characterization. The applicant’s request to change the basis for his discharge from homosexual

conduct falls squarely within the post-DADT guidance. The basis for discharge was based solely on the applicant's admission of homosexuality. However, the request for a service characterization upgrade falls outside of the guidance because the applicant's case involves aggravating factors in his record. The applicant engaged in several instances of misconduct that could form the legally sufficient basis for a general (under honorable conditions) discharge characterization. While the misconduct was not related to the basis for discharge it was properly considered for service characterization in accordance with then-existing and current policy.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 19 Dec 23 for comment (Exhibit E), 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 error or injustice. The Board concurs with the rationale and recommendation of AFPC/JA and finds a preponderance of the evidence substantiates the applicant's contentions in part. 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. Specifically, the applicant's separation code and corresponding reason for separation meets the criteria of the DoD policy on records correction following the repeal of DADT. However, the Board does not find upgrading the applicant's discharge is warranted. The DoD guidance notes 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 Board finds the applicant's numerous instances of misconduct resulting in his general (under honorable conditions) service characterization is warranted. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information and a criminal history report, the Board finds no basis to do so. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his good citizenship since his discharge, in the consideration for an upgrade of discharge characterization due to clemency/fundamental fairness. 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 the DD Form 214, *Certificate of Release or Discharge from Active Duty*, issued in conjunction with his 12 Nov 98 discharge, 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

AFBCMR Docket Number BC-2023-00928

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-2023-00928 in Executive Session on 29 Feb 24:

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 21 Mar 23.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (DoD Policy on Correcting Military Records after Repeal of DADT), dated 22 Sep 23.

Exhibit D: Advisory Opinion, AFPC/JA, dated 26 Sep 23.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 19 Dec 23.

Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clarifying Guidance), dated 19 Dec 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.

8/16/2024

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Board Operations Manager, AFBCMR

Signed by: USAF

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