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

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

Work-Product

**DOCKET NUMBER:** BC-2023-02151

**COUNSEL:** Work-Product

**HEARING REQUESTED:** YES

## APPLICANT'S REQUEST

1. Her narrative reason be changed based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654).

2. Her records be void of all documentation associated with her separation proceedings.

2. She be retroactively compensated for the day remaining on her enlistment contract.

3. She be credited with 20 years of creditable service for the purpose of a military retirement, or

4. In the alternative, she be medically retired for reason of post-traumatic stress disorder (PTSD).

## APPLICANT'S CONTENTIONS

On behalf of the applicant, counsel contends the applicant served with honor and distinction throughout the course of her military career. She was praised by senior enlisted and officers for her unwavering dedication to duty and unparalleled professional knowledge. Prior to reenlisting in the Air Force, she disclosed her sexual orientation to her commander and administration officer. Rather than immediately reporting this information and denying her the ability to reenlist, those individuals took no action. Four years after she disclosed her sexual preferences, she was maliciously targeted for separation, underwent two separation boards, and developed PTSD as a result of the separation actions. The failure to immediately initiate separation procedures and/or deny her reenlistment constitutes a constructive waiver on behalf of the Air Force.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

On 16 Oct 79, according to DD Form 4, *Enlistment/Reenlistment Document – Armed Forces of the United States*, the applicant enlisted in the regular Air Force for 4 years.

On 18 Apr 83, according to DD Form 4, the applicant reenlisted in the Regular Air Force for 6 years.

On 11 Aug 87, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Regulation (AFR) 39-10, *Administrative Separation of Airmen* with a general (under honorable conditions) discharge. The specific reason for the action was the applicant's admission she was bisexual, made on 23 Mar 87 to Air Force Office of Investigations (AFOSI) while under advisement of rights. On the same date, the applicant's commander indicated there were no actions in the applicant's file relating to misconduct or poor duty performance, as evidenced by *Statement of Duty Performance*. The applicant exercised her right to an administrative hearing before a board of officers.

On 14 Oct 87, (as outlined in the Legal Review, dated 20 Oct 87) an administrative discharge board convened and recommended the applicant be separated from the Air Force with an honorable discharge. A second board was convened on 16 Oct 87 to remedy an irregularity with the initial board for the board had not been sworn in as required prior to performing their duties. The Board reconvened and adopted their previous findings and recommendations.

On 20 Oct 87, the Staff Judge Advocate found the discharge action legally sufficient.

On 21 Oct 87, the discharge authority directed the applicant be discharged with an honorable service characterization. Probation and rehabilitation were not applicable.

On 23 Oct 87, the applicant received an honorable discharge. Her narrative reason for separation and corresponding separation code is *Admitted Homosexual or Bisexual*, GRB, and her reentry (RE) code is 2C. She was credited with 8 years and 8 days of total active service.

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

**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.

The Board staff provided the applicant a copy of the DoD policy on 30 Oct 23 (Exhibit C).

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
b. Did that condition exist/experience occur during military service?
c. Does that condition or experience actually excuse or mitigate the discharge?
d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the USD P&R 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 14 May 24, the Acting USD P&R issued clarifying guidance, dated 4 Apr 24, to Boards for Correction of Military/Naval Records considering cases involving both liberal consideration discharge relief requests and fitness determinations. As stated in the clarifying guidance, "It is DoD policy that the application of liberal consideration does not apply to fitness determinations, an entirely separate Military Department determination regarding whether, prior to 'severance from military service,' the Applicant was medically fit for military service (i.e. fitness determination)."

On 18 Jul 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit G).

In accordance with (IAW) Department of the Air Force Instruction (DAFI) 36-3203, *Service Retirements*, paragraph 3.1.1.2. *Enlisted Eligibility*. 10 U.S.C. § 9314, *Twenty to Thirty Years: Enlisted Members,* enlisted members who have at least 20 total active military service (TAFMS), but less than 30 years, meet basic eligibility criteria for retirement and may request retirement.

The Department of Defense (DoD) and the Department of Veterans Affairs (DVA) disability evaluation systems (DES) operate under two separate laws. Under Title 10, U.S.C., Physical Evaluation Boards must determine if a member's condition renders them unfit for continued military service relating to their office, grade, rank or rating. The fact that a person may have a medical condition does not mean the condition is unfitting for continued military service. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. If the board renders a finding of unfit, the law provides appropriate compensation due to the premature termination of their career. Further, it must be noted the Air Force disability boards must rate disabilities based on the member's condition at the time of evaluation; in essence a snapshot of their condition at that time. It is the charge of the DVA to pick up where the Air Force must, by law, leave off. Under Title 38, the DVA may rate any service-connected condition based upon future employability or reevaluate based on changes in the severity of a condition. This often results in different ratings by the two agencies.

**AIR FORCE EVALUATION**

The AFRBA Psychological Advisor completed a review of all available records and finds sufficient evidence to support the applicant's request to change her narrative reason for separation to Secretarial Authority, her separation code to JFF, and her RE code to 1J under the repeal of DADT (10 U.S.C. § 654). It appears the applicant was discharged solely based on her sexual orientation. The applicant had no other misconduct in her record. However, there is insufficient evidence to support the applicant's request for a change of her discharge to a medical disability retirement or a referral to the Disability Evaluation System (DES).

The applicant's counsel requests the applicant be placed on the retired rolls with 20 years of creditable service. While there is wide latitude in determining what constitutes an error or injustice, it is the DoD's policy that, broad retroactive corrections of records from applicants discharged under DADT are not warranted. Although DADT was repealed effective 20 Sep 11, it was the law and reflected the view of Congress during the period it was law.

In lieu of placing the applicant on the retired rolls with 20 years of service, counsel requests the applicant be referred to the Integrated DES (IDES) so she may be evaluated for a medical disability retirement based upon her service-connected PTSD. There is insufficient evidence to suggest the applicant had any mental health condition that made her unfit for duty during her military service or at discharge. While both counsel and the applicant contend she has PTSD, from available records, she was never diagnosed with PTSD during her military service, at discharge, or post-service. The applicant was service-connected for a mood disorder in 2021, approximately 34 years after her military discharge. Regardless of when her mental health conditions started, there is insufficient evidence to suggest she was unfit for duty from a psychological perspective. She was never placed on any Duty Limiting Conditions or a profile from a psychological perspective. She remained worldwide qualified and deployable. Additionally, all her evaluations indicated she maintained exemplary performance.

After considering the entire record and contentions, there is evidence to suggest the applicant had an experience that would mitigate her discharge. Liberal consideration is applied to the applicant's petition due to the contention of an experience and mental health condition. The following are

responses to the four questions from the Kurta Memorandum based on information presented in the records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant was discharged for her sexual orientation. Counsel also contends the applicant was diagnosed with PTSD.

2. Did the condition exist or experience occur during military service? The applicant appears to have been discharged solely based on her sexual orientation. Mental health considerations were not a factor in her discharge.

3. Does the condition or experience excuse or mitigate the discharge? Based on current policy, her sexual orientation does mitigate her discharge.

4. Does the condition or experience outweigh the discharge? Based on the corrections of military records following the repeal of DADT (10 U.S.C. § 654) it is recommended the applicant's narrative reason for discharge, separation code, and RE code be changed as previously indicated.

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 1 May 24 for comment (Exhibit E), and the applicant replied on 29 May 24. On behalf of the applicant, counsel contends while broad relief is not mandated, the Board is empowered to craft an "appropriate remedy" in cases when it determines that DADT or a predecessor policy was applied in an unjust manner and such circumstances exist in this case, and but for the unjust application of the policy, the applicant would have, at the very least, attained 20 years of creditable service.

Additionally, the advisor's assertion there is insufficient evidence to justify the applicant be medically retired predicated upon a lack of a medical diagnosis at the time of her separation and her high performance evaluations ignores the fact she did not begin to suffer from a mental health condition until she was notified she was going to be separated from service and was then forced to undergo a second separation proceeding. It is grossly illogical to place emphasis on the applicant's evaluations as evidence she was fit for duty when these reports were issued prior to the traumatic event and her development of a mental health condition. Similarly, it is illogical to point out her promotions throughout her career to support the assertion she was fit for duty as her last promotion occurred approximately 13 months prior to her separation from service and has no bearing on a fitness determination occurring over a year after her last promotion.

Counsel acknowledges the applicant did not receive service-connection for her mental health condition from the DVA until 34 years after her discharge. The fact she did not seek service-connection immediately does not mean she did not have a behavioral health condition at the time of her separation or that such condition met medical retention standards at that time.

The applicant's complete response is at Exhibit G.

**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, including the applicant's response to the advisory opinion, the Board concludes the applicant is the victim of an error or an injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor 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 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. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting the remaining portion of her request.

Regarding the applicant's request for a military retirement and compensation for the day remaining on her enlistment contract. Counsel speculates the applicant would have attained 20 years of service, qualifying for a military retirement, had it not been for her discharge for her sexual orientation. However, broad retroactive corrections of records for discharges under the Repeal of DADT are not warranted. Furthermore, the applicant served only 8 years and 8 days of active service, which does not meet the Air Force's basic eligibility criteria of 20 years for a regular military retirement. The Board finds no basis to recommend retirement or that she be retroactively compensated for the day remaining on her enlistment contract.

Regarding the applicant's request for a medical retirement. The Board applied fundamental fairness based on her mental health condition in accordance with the Under Secretary of Defense supplemental guidance (Wilkie memorandum), dated 25 Jul 18, specifically paragraph 6.h., and considered relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety. However, the Board finds the applicant's mental health condition is not warranted to process through DES as a matter of equity or good conscience IAW DoDI 1332.18, Disability Evaluation System, Appendix 1 to Enclosure 3, paragraph 4. Specifically, her mental health condition was not a medical basis for career termination, nor did it meet the criteria for referral to the medical evaluation board (MEB) for a medical discharge or retirement. While the Board notes the Psychological Advisor applied liberal consideration, the Kurta memorandum applies solely to requests for discharge relief. Consequently, the Board did not apply liberal consideration in this case.

Finally, given the applicant's discharge was within Air Force policy at the time, and finding no error in the discharge process, the Board concludes that removing the discharge documentation from the record is not warranted and should remain as a matter of record. Therefore, the Board recommends correcting the applicant's records as indicated below.

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 on 23 Oct 87, be amended to reflect a Separation Code of JFF, a Narrative Reason for Separation of Secretarial Authority, and a Reentry code of 1J.

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-2023-02151 in Executive Session on 22 Aug 24:

Work-Product 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 26 Jun 23.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Notification of DoD Policy, w/atch (DoD Policy on Correcting Military Records after Repeal of DADT) to applicant, dated 30 Oct 23.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 30 Apr 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 1 May 24.
Exhibit F: Applicant's Response, dated 29 May 24.
Exhibit G: Notification of USD P&R Guidance, w/atchs (Post-Service Request and Liberal Consideration Guidance) to applicant, dated 18 Jul 24.

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.

11/7/2024

X Work-Product

Work-Product
Board Operations Manager, AFBCMR
Signed by: USAF