

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02685

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His official military personnel records amended to change the characterization of his discharge.

APPLICANT'S CONTENTIONS

He is requesting a change in the characterization of his discharge so he can use his military experience to qualify for loans and medical support, and to be available for military service, if needed. He was forced out of the Air Force in basic due to his sexual preference after being harassed and tricked by a senior officer. He wants no repercussions brought to anyone. He just wants to be able to have support for the service he made and be recognized for his contribution. He also thoroughly enjoyed the structure and environment of the military and regrets not being able to do more for his country, then and now.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 18 Nov 98, according to DD Form 4, *Enlistment/Reenlistment Document Armed Forces of the United States*, the applicant enlisted in the Regular Air Force for a period of four years.

On **Work-Product** the applicant's commander recommended the applicant be discharged from the Air Force for Entry Level Performance or Conduct, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.22.2.. The specific reasons for the action were:

a. On or about 2 Mar 99, [the applicant] was identified for acting out and being disruptive in class. On or about 3 Mar 99, [the applicant] was identified as being disruptive in class, showing disrespect to his instructor, and lacking discipline. On or about 4 Mar 99, [the applicant] interrupted class by pulling off his sweater in class, rolling down the collar, and then draping it over his shoulders, in violation of AFI 36-2903, *Dress and Personal Appearance*. For the above misconduct, the applicant received a Letter of Reprimand (LOR), dated 8 Mar 99, and an Unfavorable Information File (UIF), dated 8 Mar 99.

b. On or about 6 Apr 99, [the applicant] failed to report to his assigned place of duty, arriving to his duty section 30 minutes later than scheduled. On or about 7 Apr 99, [the applicant] failed to report to his assigned place of duty. His duty day began at 0700 hours, and he called in at 0840 hours. He was instructed to report to work immediately but did not show until 1045 hours. On or about 8 Apr 99, [the applicant] again did not report to his assigned place of duty. He called in at 0705 hours and reported in at 0730 hours. On or about 12 Apr 99, [the applicant] did not report to his assigned place of duty. He reported in to work at 0830 hours. Due to the above misconduct, the applicant received an LOR, dated 12 Apr 99.

c. On or about 3 May 99, [the applicant] failed to report to his assigned place of duty. He reported to his duty section at 0715 hours. His duty day begins at 0700 hours. On or about 4 May 99, [the applicant] did not report for work at his scheduled duty time. He did not show for work until 0750 hours. Due to the above misconduct, the applicant received a Letter of Counseling (LOC), dated 12 May 99.

d. On or about 12 May 99, [the applicant] reported to his assigned place of duty in violation of AFI 36-2903. His hair color was neither conservative nor natural in appearance, for which he received an LOR, dated 12 May 99.

According to a 37 TRW/JAM memorandum, Subject: Legal Review of Administrative Discharge Under AFDP 36-32 and AFI 36-3208, para. 5.22.2, the Staff Judge Advocate found the discharge action legally sufficient.

On 27 May 99, the discharge authority directed the applicant be discharged for Unsatisfactory Performance or Conduct, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 28 May 99, the applicant received an uncharacterized Entry Level Separation (ELS). His Narrative Reason for Separation is "Entry Level Performance and Conduct", and he was credited with 6 months and 11 days of total active service.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C and F.

POST-SERVICE INFORMATION

On 7 May 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation; however, he has not replied.

APPLICABLE AUTHORITY/GUIDANCE

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 Post-Traumatic Stress Disorder (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 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 paragraphs 6 and 7 of the Wilkie Memo.

On 7 May 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

AFI 36-3208, dated 14 Oct 94, Chapter 1 – *General Procedures*:

1.19. *Separation Without Service Characterization*:

1.19.1. *Entry Level Separation*. 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. 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 separation unless:

1.19.1.1. 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

1.19.1.2. 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.

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.

Under Other than Honorable Conditions. This characterization is used when basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of members. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the DAF.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual abuse of a child, sexual harassment, and attempts to commit these offenses.

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the application. Based on review of the applicant's request, there is no error or injustice with the discharge processing.

Airmen are in entry level status during the first 180 days of continuous active military service. The Department of Defense determined if a member served less than 180 days continuous active service, it would be unfair to the member and the service to characterize their limited service.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 11 Apr 24 for comment (Exhibit D) but has received no response.

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge based on his mental health condition.

A review of the available records finds no evidence or records to corroborate the applicant's contentions. Although it is possible he experienced harassment due to his sexual preference as contended, there is no evidence to support his experience or claim. During his brief time in service with the Air Force, he was documented to have engaged in disruptive behaviors and being late or failed to report to his appointed place of duty on numerous occasions. The applicant received at least two LORs and an LOC for his misconduct. Despite his leadership's efforts to counsel him, he was unable to repair his behaviors. The reasons for his behaviors and misconduct were not explained by the applicant or in his military records, but the existing records do not suggest they were caused by his mental health condition, including PTSD, or being harassed because of his sexual preference. There is no evidence or records indicating his acts of misconduct and discharge were caused by his sexual preference, and he was not discharged from the Air Force due to his sexual preference. The applicant was discharged from

the Army National Guard (ARNG) of Texas for homosexual conduct, which occurred about five years after his discharge from the regular Air Force. The two reasons for his discharges from the Air Force and Army National Guard, respectively, appear to have no relation to one another. Furthermore, the applicant did not discuss when he was diagnosed with PTSD or another mental health condition, the symptoms of PTSD and other mental health conditions that he had or experienced during service, how any of his mental health conditions or symptoms caused any of his maladaptive behaviors and subsequent discharge, and how his mental health condition may excuse or mitigate his discharge. There is no evidence or records to support he was ever diagnosed with PTSD, or any other mental health condition based on his experiences while in the Air Force by a duly qualified mental health provider. There is also no evidence or records he had a mental health condition or was in significant emotional distress causing his judgment to be impaired leading to any of his misconduct. There is also no evidence the applicant's mental health condition and/or stressful or traumatic experiences due to his sexual preference had a direct impact or was a contributing factor to his discharge. He was discharged under ELS and furnished with uncharacterized service because he served less than 180 days of continuous active military service with the regular Air Force. Note: The applicant was notified of discharge action on **Work-Product** which was less than 180 days of active military service. The time of notification determined his ELS discharge. The applicant's discharge characterization is consistent with past regulations of AFI 36-3208, the regulation he was discharged under, and to current regulation of DAFI 36-3211. His uncharacterized service is the appropriate characterization based on his military records and per regulation. The applicant's testimony for this petition is found to be not compelling nor sufficient enough to support his contention and request. As a result of an exhaustive review of the available records, his psychological advisor finds there is no error or injustice identified with his discharge from a mental health perspective to support his request for an upgrade of his discharge based on his mental health condition and/or from his harassment experiences based on his sexual preference.

Liberal consideration is applied to the applicant's request for an upgrade of his discharge due to his contention of having a mental health condition during service. It is reminded that liberal consideration does not mandate an upgrade per policy guidance. The following are answers to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant marked "PTSD", "Other Mental Health", and "Reprisal/Whistleblower" on his application to the Air Force Board for Correction of Military Records (AFBCMR) as issues or conditions related to his request. He provided an explanation for why corrections should be made to his records, "i (sic) was forced out of USAF, penalized by USAF in basic due to my sexual preference (sic) after being harassed (sic) and tricked by a senior officer. i (sic) want no repercussions (sic) brought to anyone. i (sic) just want to be able to have support for the service i (sic) made and be recognized for my contribution. i (sic) also thoroughly enjoyed the structure and environment of the US military and regret not being able to do more for my country, then and now (sic)." The applicant did not clearly discuss his mental health condition and how his mental health condition or experience may excuse or mitigate his discharge from the Air Force.

2. Did the condition exist, or experience occur, during military service?
There is no evidence or records the applicant's mental health condition, including PTSD, or his experiences of being harassed due to his sexual preference had existed or occurred during his military service with the Air Force. There is no evidence or records to support the applicant was ever diagnosed with PTSD or any other mental health condition based on his experiences in the Air Force by a duly qualified mental health provider.

3. Does the condition or experience actually excuse or mitigate the discharge?
There is no evidence the applicant's mental health condition, including PTSD, and/or harassment experiences due to his sexual preference had a direct impact or was a contributing factor to his

misconduct resulting in his discharge from service with the Air Force. There is no evidence or records he had a mental health condition or was in significant emotional distress causing his judgment to be impaired leading to any of his misconduct. The applicant was discharged under ELS for serving less than 180 days of continuous active military service and was furnished with uncharacterized service. His discharge characterization is consistent with past regulations of AFI 36-3208, the regulation he was discharged under, and to current regulation of DAFI 36-3211. His uncharacterized service is the appropriate characterization based on his Air Force military records per regulation. The applicant's mental health condition and harassment experiences due to his sexual preference do not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition and harassment experiences due to his sexual preference do not excuse or mitigate his discharge, his condition and experiences also do not outweigh his original discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 7 May 24 for comment (Exhibit G) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by Title 10, United States Code § 1552(b).

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 not the victim of an error or injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor and the rationale and recommendation of AFPC/DP2SSR and finds a preponderance of the evidence does not substantiate the applicant's contentions. There are no mental health treatment records available or provided by the applicant that support his contention he had a mental health condition, including PTSD, during military service. Liberal consideration was applied; however, his misconduct could not be excused or mitigated by his mental health condition. The characterization of the applicant's service was in accordance with AFI 36-3208.

Further, the applicant's election of "DADT" and "Reprisal/Whistleblower" on his application to the Board, is neither addressed nor supported by evidence regarding his Air Force service. While the applicant provided discharge documentation from the ARNG referencing separation due to homosexual conduct, correction of these records is outside the authority of the AFBCMR.

Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. 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/criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against 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 Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

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-2023-02685 in Executive Session on 12 Sep 24:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, undated.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DP2SSR, dated 23 May 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Apr 24.
Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 7 May 24.
Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 6 May 24.
Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 7 May 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.

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Board Operations Manager, AFBCMR