

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01172

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His separation code, narrative reason for separation and reentry code be changed, based on the repeal of Title 10, United States Code, Section 654 (10 U.S.C. § 654).

APPLICANT'S CONTENTIONS

He has faced discrimination and hostility due to his narrative reason which, under current standards is neither a crime, misconduct, nor violation of Air Force regulations and cannot lead to separation. According to Department of Defense guidance (the Stanley Memorandum), dated 20 Sep 11, data on the DD Form 214, *Certificate of Release or Discharge from Active Duty*, should be changed to that outlined in the guidance. It is also equitable with the following AFBCMR cases: BC-2021-00360, BC-2019-1775, and BC-2021-0022.

To not make the requested changes would be inequitable and a violation of the Administrative Procedure Act and federal court decision in the case of *Wilhelmus v. Geren* which states that a Board for Correction of Military Records must treat similar applicants in a similar manner or must provide a written explanation why the cases were decided differently.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

In an undated memorandum, the applicant's commander recommended he be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.36 for disclosing to his commander that he was homosexual with a propensity to engage in homosexual acts.

On 6 Sep 05, the Staff Judge Advocate found the discharge action legally sufficient.

In an undated memorandum, the discharge authority directed the applicant be discharged for homosexual conduct with honorable service characterization. Probation and rehabilitation was denied.

On 13 Sep 05, the applicant received an honorable discharge with a separation code and corresponding narrative reason for separation of HRA, *Homosexual Act*, and reentry code of 2C, *Involuntarily Separated with an honorable discharge or entry level separation without characterization of service*. He was credited with 2 years and 5 days of total active service.

The applicant contends his request should be granted, in part, based on similar circumstances in other AFBCMR cases in which the Board granted relief:

In BC-2021-00360, the applicant's commander recommended he be discharged from the Air Force under the provisions of AFI 36-2608, paragraph 5.36.2.1, homosexual conduct. The specific reasons for the action were based on the applicant's admission to allegations regarding his homosexual relationship with an individual for more than a year, including participation in various sexual acts on numerous occasions. The applicant also admitted to engaging in homosexual acts with two other individuals. He received a discharge under honorable conditions (general). The Board determined the applicant's discharge did not involve aggravating factors and met the criteria of the DoD policy for an honorable discharge. While the applicant in the cited case and the applicant in the current case were discharged under DADT policy, the conduct and circumstances that led to their discharges are different. As such, each received a different characterization of service.

A search of the AFBCMR database revealed BC-2019-1775 and BC-2021-0022 are not valid docket numbers of previous or current AFBCMR cases.

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

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 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 16 May 24 for comment (Exhibit D) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
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. The applicant contends his request is similar to AFBCMR cases BC-2021-00360, BC-2019-1775,

and BC-2021-0022 and that he should receive relief similar to the Board's decision in those cases. However, the Board disagrees in part. A search of the AFBCMR's database failed to reveal previous or current cases for docket numbers BC-2019-1775 and BC-2021-0022. Additionally, the applicant in BC-2021-00360 and the applicant in the current case were discharged under DADT policy; however, the conduct and circumstances that led to their discharges are different. Although there may be similarities, each case is evaluated based on its own merits. Nevertheless, while the Board finds no error in the applicant's 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. Therefore, the Board recommends correcting the applicant's record 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 on 13 Sep 05, be amended to reflect he was discharged with a Separation Code of JFF, a Narrative Reason for Separation of Secretarial Authority, and a Reentry Code of 1J.

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-2024-01172 in Executive Session on 19 Jul 24:

, 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/atch, dated 21 Mar 24.
- 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 16 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.

X

Board Operations Manager, AFBCMR