

**SUMMARY:** The applicant was discharged on 20 October 2004 in accordance with Air Force Instruction 36-3208, *Administrative Separation of Airmen*, with a General Discharge for Homosexual Conduct. The applicant appealed for an upgrade of his discharge characterization, narrative reason and a change to the reentry code on 03 July 2019. The applicant's narrative reason was changed to Secretarial Authority on 11 February 2020; however, no other aspects of his case were upgraded.

The Discharge Review Board reconsidered this application for an upgrade to his discharge characterization and reentry code through voluntary remand. The applicant was represented by counsel. The applicant requested the Board be completed based on a records only review. The case was considered on 29 September 2023.

The attached examiner's brief (provided to applicant only), extracted from available service records, contains pertinent data regarding the circumstances and character of the applicant's military service.

**DISCUSSION:** The Discharge Review Board (DRB), under its responsibility to examine the propriety and equity of an applicant's discharge, is authorized to change the characterization of service and the narrative reason for discharge if such changes are warranted. If applicable, the board can also change the applicant's reentry code. In reviewing discharges, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption, to include evidence submitted by the applicant. The Board completed a thorough review of the circumstances that led to the discharge and the discharge process to determine if the discharge met the pertinent standards of equity and propriety.

The applicant's record of service included two Article 15s, a vacation of suspended non-judicial punishment, a Letter of Reprimand, a Record of Individual Counseling, and multiple Memorandums for Record. His misconduct included: Attempt to be medically discharged rather than face punishment and stated he would have severe panic attacks to get such a discharge. Without authority, failed to go at the time prescribed to the appointed place of duty for PT (three occurrences); Without authority, failed to go at the time prescribed to the appointed place of duty, Building 1 Intelligence Flight; Without authority, failed to go at the time prescribed to the appointed place of duty for PT and his duty section (three occurrences); Violated a lawful order issued by a doctor to remain in quarters for 24 hours; Without authority, failed to go at the time prescribed to the appointed place of duty for a household goods briefing; Failed to obey the posted speed limit; and Failed to remain on station while in phase 1 training.

The documentary evidence the Board considered as part of the review includes but is not limited to, the DD Form 293, *Application for the Review of Discharge from the Armed Forces of the United States*, and any additional documentation submitted by applicant and/or counsel; the applicant's personnel file from the Automated Records Management System (ARMS); and the DRB Brief detailing the applicant's service information and a summary of the case.

The applicant, through counsel sought a reexamination of the previous DRB decision. The Air Force voluntarily agreed to remand this applicant's case. The applicant previously contended that he was discharged for homosexual conduct, and his minor disciplinary infractions were the result of the hostile work environment due to his sexual orientation. He requested his discharge be upgraded to Honorable and his reentry code changed under liberal consideration.

The applicant, through counsel, indicated that the DRB denied his previous request to upgrade the character to Honorable and change the reentry code which makes him ineligible to seek commission in the Navy

Reserves. They contended that the Board failed to acknowledge the harassment the applicant suffered nor considered how the mental health condition, as a direct result of the harassment, contributed to the misconduct. They contended that the applicant would not have been discharged if he wouldn't have revealed his sexual preference and highlighted that there was no evidence that a discharge was being considered until after his letter was submitted to the commander. They indicated that the misconduct was relatively minor and wouldn't have resulted in a discharge. Lastly, they contended that the misconduct was the result of trauma from sexual harassment due to his sexual orientation. The applicant wishes to serve again by joining the Navy Reserves.

The DRB reviewed the applicant's entire service record and did not find evidence of impropriety or inequity to warrant an upgrade of the discharge, beyond that already provided in the previous decision (FD-2019-00702) in accordance with the guidance set forth in the "Correction of Military Records following repeal of Section 654 of Title 10 U.S. Code, date 20 September 2011." The applicant, through counsel, contended that his admission of homosexuality was the reason for his discharge, however, the discharge package contained two bases for the discharge: Minor Disciplinary Infractions and Homosexual Conduct. After considering the totality of the circumstances, the Board determined that the member's pattern of misconduct alone was sufficient to warrant a discharge. Per AFI 36-3208, Airmen who engage in a pattern of minor disciplinary infractions during their enlistment are subject to discharge. The applicant served a total of one year and three months. Six of those months contained at least one act of misconduct each. As noted in the 18 October 2004, Memorandum for 22 ARW/CC, the applicant had five records of individual counseling, one Letter of Reprimand, two Article 15s, and one vacation of suspended Article 15 (Non-Judicial Punishment) during his enlistment. The Board also noted that the applicant sought a General discharge. He admitted, both to his supervision and medical provider, that he desired a discharge and intended to make statements necessary to obtain one. After being advised that a medical discharge would be lengthy and that a false medical claim would be malingering, he provided his unit a memo disclosing his sexual preference and asking to be discharged.

The applicant contends that he experienced harassment based on his sexual orientation, and the Board acknowledged that an applicant's testimony alone, oral or written, may establish the existence of a fact supportive of relief. The Board considered the applicant's testimony along with all available records and found that the records, including the applicant's own submission, contradicted and outweighed the applicant's testimony of a nexus between the applicant's experience of sexual harassment and the misconduct that led to his discharge. First, while the applicant contends he was 'relentlessly sexually harassed and abused' for his homosexuality, his own psychologist states that he was closeted and had not told anyone of his sexuality, nor did he commit homosexual acts. In his affidavit to the Board, the applicant attributed his misconduct to harassment by members in the 22 OSS, however, his misconduct began at another base, under different supervision, where he was issued his first Article 15. Command gave the applicant ample opportunities to change this pattern of behavior in the form of various administrative actions, however, the applicant continued to commit misconduct. Additionally, while undergoing the discharge process, the applicant requested to remain in the same shop where he contended he experienced harassment, per his Memorandum for 22 OSS/CC, dated 24 September 2004. Further, the records reflected a contradiction between the applicant's contention that he was "subject to ridicule and public humiliation because of sexual orientation" in his unit, that his failure to go (x6) were avoidant behavior, indicative of anxiety and sexual harassment victims, and his request to remain in his shop until his discharge. The applicant suggested harassment substantially contributed to his misconduct and yet specifically requested to remain in that environment and "not be treated differently." The applicant's personnel and mental health records do not indicate the applicant reported any experience of harassment, abuse, or any distress related to the way he was being treated by anyone during his time in service, nor did he provide any witness statements or corroborating evidence to overcome the contradiction between his record and his written testimony to the Board. Additionally, there is no evidence the psychologist rendering an opinion for the applicant has ever been a treating provider of the applicant, either during his time in service or post service. While this provider

is able to render an opinion or diagnosis of the applicant at the time she was treating or evaluating him, this provider can only speculate about the applicant's time and experience in service and cannot render an opinion or diagnosis about the "snapshot in time" of applicant's military service. For example, she states the member's failures to go were avoidance behavior to escape the source of his anxiety/triggers; however, the applicant states many of his failures to go were attributed to oversleeping due to alcohol consumption.

**LIBERAL CONSIDERATION:** Due to evidence of a mental health condition found in the applicant's medical record, and his contention that he experienced sexual harassment, the Board considered the case based on the liberal consideration (LC) standards required by "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," dated 25 July 2018 and 10 USC §1553. The Board included a member who is a physician, clinical psychologist, or psychiatrist. Specifically, the Board reviewed the four questions from "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment" dated 25 August 2017 provided that boards should consider when weighing evidence in requests for modification of discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault, and sexual harassment. The Board considered the following:

1. Did the veteran contend that a condition or experience may have excused or mitigated their misconduct or discharge?

*The applicant, through counsel, contended he was harassed and berated because of his sexual orientation and became depressed, anxious, and unable to sleep, making it difficult for him to function during military service. They contended his minor misconduct infractions of tardiness and absences were the result of his stress and depression from the traumatizing environment.*

*The applicant's records and testimony revealed the applicant endorsed symptoms of anxiety and bereavement during his time in service. The applicant's records reflect the applicant reported difficulty sleeping at times and endorsed drinking maladaptive amounts of alcohol to go to sleep which led to his workplace tardiness; the applicant's records also revealed that the applicant reported distress due the death of two friends in a car accident (bereavement). There is evidence the applicant endorsed and received treatment for mental health symptoms during his time in service. There is no evidence or records the applicant's symptoms or misconducts were caused by his stated experience of sexual harassment.*

2. Did that condition exist/experience occur during military service?

*The applicant's service treatment records revealed he was initially seen at the Life Skills Support Center (LSSC) on 16 January 2004 related to relational issues with his sister. He did not attend any follow-up sessions after this visit. A couple of months later, on 02 March 2004, he informed his primary care manager (PCM) he was having difficulties with training and fellow students, was feeling stressed with school, and requested a sleep aid. He was prescribed Diphenhydramine (Benadryl) for sleep by his PCM. He returned to see his PCM on 12 March 2004 and this time, was prescribed Paroxetine (Paxil) for anxiety and received another type of sleep aid, Ambien. On 14 May 2004, he completed an intake for mental health treatment services. His notes were vague, but a diagnosis of Generalized Anxiety Disorder (GAD) was annotated in the notes with no rationale provided for this diagnosis. He was referred to a psychiatrist on 19 May 2004 by his PCM after he reported Paxil was not working and requested new medications. He was prescribed Elavil in addition to Paxil by his PCM during this visit. A progress note from his psychiatrist dated on 26 May 2004 reported the applicant had been extremely anxious for about a year, had sleep problems due to thinking about his life while lying in bed, and would get nervous about situational events. These events were not clarified further. He was also given a diagnosis of GAD by the psychiatrist. There were no other records*

reporting he was seen by the psychiatrist again, but treatment notes from his PCM dated on 24 June 2004 and 06 July 2004 reported his prescribed medications were Paxil and Ambien. A treatment note dated on 03 June 2004 from a psychologist reported the applicant's diagnosis/condition of GAD was considered to be "in full remission" indicating his anxiety had improved and resolved. He was seen twice by this psychologist and treatment was terminated. A Treatment Summary dated on 02 August 2004 reported the applicant's GAD was modified to "in partial remission" instead of "in full remission". This signified his symptoms were still improving but not enough time had passed to demonstrate his symptoms were in full remission. His mental health treatment case was closed on 18 August 2004 due to him showing improvements over the course of treatment.

There were no records available or submitted indicating he received any post service mental health treatment. There is evidence the applicant received treatment from his PCM, psychiatrist and psychologist for anxiety and sleep issues during his time in service. There was no evidence he was depressed or given a diagnosis related to depression. There was no objective evidence supporting he experienced sexual harassment or was reprimanded due to his sexual orientation. The applicant's personal testimony of experiencing harassment due to his sexual orientation during service is acknowledged.

### 3. Does that condition or experience actually excuse or mitigate the discharge?

The applicant's service treatment records revealed he experienced anxiety and sleep issues and was prescribed medications for these conditions by his PCM and a psychiatrist and attended two sessions with a psychologist during service. The reasons for the applicant's anxiety and sleep issues were attributed to work stressors and situational events. The Board acknowledges that it is possible the vague "situational events" were caused by the harassment pertaining to his sexual orientation as the applicant and his legal counsel contended. There was, however, no evidence the applicant was depressed during service other than his symptoms related to bereavement. The evaluation from the psychiatrist reported the applicant denied he was feeling depressed, and his medical records found he was not given any mood or depressive disorders during service. He was consistently given a diagnosis of GAD and variations of an anxiety disorder. Despite this anomaly, there was evidence the applicant sought and received mental health treatment for his stressors.

The applicant's records revealed there were multiple Memorandums for Record (MFR) written by his leadership detailing the applicant's behaviors. These MFRs reported he was late due to not setting his alarm clock, his car did not start one morning but he decided to not show up to work until almost three hours later when his leadership went to his dorm room to check on him, he failed to remain on base while placed on 24-hour quarters but was instead, was found to be getting something to eat with friends, and he threatened to fabricate a mental illness to get medically discharged so he would not face additional punishment for his misconduct.

The applicant stated in his personal statement "At the time I knew being gay was not acceptable and the military, through its due course would 'straighten' me out, so to speak. I kept these feelings inside for a while which ultimately turned into self-sabotaging behavior for my continued military goals." The applicant later states that he began a pattern of maladaptive alcohol use to cope with his uncertain feelings about his sexual orientation. The applicant further stated his pattern of alcohol use led to him to a pattern of oversleeping and tardiness (no mention of sexual harassment).

Also, the applicant stated "I never blamed the military for the position I put myself in. I knew then and I know today, had I been more mature and better equipped with the personal tools to handle my emotions in a more appropriate manner I would still be in the military and thriving." This statement is not indicative of the applicant's misconduct being caused by sexual harassment, this statement, more likely than not, reflects the applicant's difficulty adjusting to the military lifestyle and personal, internal struggles with his sexual orientation during his time in service. While this may explain his maladaptive behavior and misconducts, it

*does not mitigate them. Poor coping skills and immaturity do not constitute a mitigating mental health condition under the intent of liberal consideration. Furthermore, the applicant's mental health records revealed the applicant reported his mental health symptoms to be resolved in June 2004; and even though his condition was noted to be in partial-remission at a follow-up visit in August 2004 the applicant's records revealed the applicant's symptoms to be resolved or near-resolved. The applicant's administrative record revealed he continued to miss appointments and physical training sessions despite a lack of mental health symptoms (reported to or observed by anyone including the applicant, medical or mental health provider, chain of command), thus there is no evidence of a mitigating nexus between the applicant's in-service mental health conditions and his misconducts.*

*The applicant's records also revealed he was cited for getting a speeding ticket and received his first Article 15 prior to his first duty station assignment for failure to remain on station while in Phase I training in Texas, during which time the applicant willfully left base and socialized in a hotel room with other trainees, as acknowledged in his personal statement. The applicant and his legal counsel focused on and addressed his issues of being tardy and not showing up to physical training because he was sexually harassed, but they neglected to explain his behaviors described in the MFRs and/or address his other misconduct such as his failure to remain on station while in Phase I training. These unaddressed issues do not reveal a nexus or direct correlation to the applicant's mental health condition. A review of the applicant's records revealed the applicant exhibited difficulties abiding by the rules and adjusting to the military structure and environment. The DRB stated he was given ample opportunities and assistance from his leadership to modify his negative behaviors, but he was unreceptive to their efforts.*

*The Board acknowledged that the applicant's personal testimony may establish, in the absence of objective evidence, the existence of the condition or experience. The Board considered this testimony along with all available records. The applicant's in-service records revealed misconduct that was not attributed nor could be explained by his mental health condition or contended experience of sexual harassment. Furthermore, the applicant identified a specific Lieutenant who had allegedly harassed him; a review of the applicant's records found other individuals in his chain of command who had counseled, interacted, or observed his behaviors and their justification for disciplinary actions appeared to be appropriate and there was no evidence they were unjustly or inappropriately given based on his sexual orientation or experience with sexual harassment.*

*The Board considered the independent review performed by a licensed psychologist and submitted by the applicant as evidence to substantiate his claim. The Board disagrees that the applicant's symptoms of anxiety and sleep issues were caused by the contended experience of sexual harassment. The applicant's record demonstrated that his behaviors that were not convincingly caused nor could be explained by his mental health condition. The misconduct continued to occur after his GAD was noted to be in remission. The applicant does not have a flawless record, and this is not a prerequisite for an Honorable discharge; however, the Board finds the negative aspects of his repeated misconduct over his brief time in service (One year, three months, six days' time) could not be overlooked and does not sufficiently demonstrate his mental health condition or experience outweighed his General discharge.*

*Additionally, there is no evidence the psychologist rendering an opinion for the applicant has ever been a treating provider of the applicant, either during his time in service or post service. While this provider is able to render an opinion or diagnosis of the applicant at the time she was treating or evaluating the applicant, this provider can only speculate about the applicant's time and experience in service and cannot render an opinion or diagnosis about the "snapshot in time" of applicant's military service.*

*There is no evidence or testimony that the applicant reported his experience of harassment or reported any indicators of harassment to anyone during his time in-service, including medical or mental health providers, chaplains, unit leadership, peers, or family. The board acknowledges that reporting his experience of*

*harassment was not required. In reviewing the applicant's testimony along with the available in-service and post-service records there is no evidence the applicant exhibited distress related to his experience of harassment that correlates to the misconducts for which he was discharged. The applicant's stated in his testimony that his tardiness was due to excessive alcohol use which led to oversleeping; There is no evidence of a nexus between the applicant's mental health condition or his experience of sexual harassment and failing to remain in quarters. There is no evidence of a nexus between the applicant's mental health condition or his experience of sexual harassment and failing to go to the Traffic Management Office for a household goods briefing. There is no evidence of a nexus between the applicant's mental health condition or his experience of sexual harassment and failing to obey the posted speed limit. Additionally, the applicant did not remain on base during phase I training, for which he received his first Article 15. There is no evidence of a nexus between the applicant's mental health condition or his experience of sexual harassment and failing to remain on base during phase I training. Even if the Board, in the broadest application of liberal consideration, found the applicant's failure to go to be mitigated due to his claimed symptom of avoidance due to his experience of sexual harassment, which is contradictory of the applicant's request to remain in the unit, neither the applicant's mental health condition nor his experience of sexual harassment in-service, excuse or mitigate his misconduct. The Board opined that there is sufficient misconduct to form a basis of a General Discharge.*

4. Does that condition or experience outweigh the discharge?

*The Board reviewed the applicant's entire application and record. When considering the totality of the circumstances, it concluded that the applicant's mental health conditions and/or contended sexual harassment experience do not outweigh the applicant's pattern of misconduct during his brief time in service. The applicant's mental health conditions and/or sexual harassment experience also do not outweigh his General discharge.*

Additionally, the Board considered the factors laid out in the attachment to the Under Secretary of Defense memorandum, *Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations*, dated 25 June 2018, known as the "Wilkie Memo." The Board considered the factors listed in paragraphs (6)(a)-(6)(l) and (7)(a)-(7)(r) of this memorandum and determined that the discharge was equitable. While the DRB is not required to address each issue or aspect of the supporting material to the application, however, the Board lists the following factors in this decisional document to help the applicant understand the DRB's position.

(7)(a). The applicant's candor. The applicant provided written testimony contending that sexual harassment mitigated his behavior; however, the Board found that the available records, including the applicant's submission of testimony and evidence, were contradictory and outweighed the applicant's testimony in which he claimed a mitigating nexus between his experience, in service, of sexual harassment and the misconducts that caused led to his discharge.

(7)(b). Whether the punishment, including any collateral consequences, was too harsh. The Board determined that similarly situated airmen typically receive a General characterization. A characterization of service as Under Honorable Conditions (General) is warranted when the negative aspects of the service member's conduct or performance of duty outweigh positive aspects of their conduct or performance of duty. The applicant's records revealed he had a total of 12 documented misconducts, with at least one instance of misconduct in 6 of his 15 months of service.

(7)(c). The aggravating and mitigating facts related to the record or punishment from which the veteran or service member wants relief. The applicant's experience does not mitigate the misconduct. The applicant's record of misconduct began prior to the contended onset of his mental health condition and continued after his General Anxiety Disorder was noted to be in remission by his in-service mental health provider.

Furthermore, a conflict exists between his contended experience of sexual harassment and his claimed impact of this experience on his misconducts, including his contention that his misconduct was caused by avoidance behavior from the harassment he experienced. This claim contradicts his expressed desire in 2004 to remain in the same shop, where he was allegedly harassed and his request to not be treated differently while pending discharge.

(7)(e). Severity of misconduct. The applicants misconduct resulted in two Article 15s, a vacation of suspended non-judicial punishment and a letter of reprimand as well as a record of individual counseling and multiple memorandums for record documenting verbal counseling with the applicant. Through the administrative actions taken by the chain of command in this case, the applicant had ample opportunities to change his negative behavior, but consistently flouted the authority of his leadership with repeated misconduct.

(7)(f). Length of time since misconduct. The applicants misconduct occurred 19 years ago. The Board took into consideration the significant amount of time between the in-service misconduct and the application to the Board. There is no law or regulation that provides for an unfavorable discharge to be upgraded based solely on the passage of time or good conduct subsequent to leaving the service.

(7)(n). Job history. The applicant provided evidence of positive education and work performance. The Board is authorized to consider post-service factors in the recharacterization of a discharge. Outstanding post-service conduct, to the extent such matters provide a basis for a more thorough understanding of the Applicant's performance and conduct during the period of service under review is considered during Board reviews. Positive post-service conduct and job history does not guarantee the upgrade of an unfavorable discharge, as each discharge is reviewed by the Board on a case-by-case basis to determine if post-service accomplishments help demonstrate that in-service misconduct was an aberration and not indicative of the member's overall character.

**FINDING:** The DRB voted unanimously to *deny* the applicant's request to upgrade his discharge characterization and to change the reentry code. The narrative reason was previously upgraded to "Secretarial Authority" (FD-2019-00702), in accordance with the guidance set forth in the "Correction of Military Records following repeal of Section 654 of Title 10 U.S. Code," date 20 September 2011.

**CONCLUSION:** After a thorough review of the available evidence, to include the applicant's testimony, the summary of service, personnel and medical records, and discharge package, the Board found the discharge was proper and equitable. Therefore, the awarded characterization of service shall remain "General," the narrative reason for separation shall remain "Secretarial Authority," and the reentry code shall remain "2B." The Air Force DRB (AFDRB) results were approved by the board president on 08 November 2023. If desired, the applicant can request a list of the board members and their votes by writing to:

Air Force Review Boards Agency  
Attn: Discharge Review Board  
3351 Celmers Lane  
Joint Base Andrews, NAF Washington, MD 20762-6602  
Instructions on how to appeal an AFDRB decision can be found at  
<https://afrbportal.azurewebsites.us>

Attachment:  
Examiner's Brief (Applicant Only)

