

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

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|---|--|-------------------------------------|--|--|-------------------------------------|--|-------------------------------------|
| NAME OF SERVICE MEMBER (LAST, FIRST MIDDLE INITIAL) [REDACTED] | | GRADE A1C | AFSN/SSAN [REDACTED] | | | | |
| TYPE Honorable | <input checked="" type="checkbox"/> PERSONAL APPEARANCE | | RECORD REVIEW | | | | |
| COUNSEL | | NAME OF COUNSEL AND OR ORGANIZATION | | ADDRESS AND OR ORGANIZATION OF COUNSEL | | | |
| YES | NO | | | | | | |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | | | | | | |
| MEMBERS SITTING | | | VOTE OF THE BOARD | | | | |
| [REDACTED] | | | HON | GEN | UOTHC | OTHER | DENY |
| | | | | | | <input checked="" type="checkbox"/> * | |
| [REDACTED] | | | | | | | <input checked="" type="checkbox"/> |
| | | | [REDACTED] | | | | |
| [REDACTED] | | | | | | | |
| | | | [REDACTED] | | | | |
| ISSUES A01.17, A01.31, A01.39, A01.49, A94.21 | | INDEX NUMBER A46.03 | | | | EXHIBITS SUBMITTED TO THE BOARD | |
| | | | | 1 | ORDER APPOINTING THE BOARD | | |
| HEARING DATE 012303 | | CASE NUMBER FD2002-0332 | | 2 | APPLICATION FOR REVIEW OF DISCHARGE | | |
| | | | | 3 | LETTER OF NOTIFICATION | | |
| | | | | 4 | BRIEF OF PERSONNEL FILE | | |
| | | | | COUNSEL'S RELEASE TO THE BOARD | | | |
| | | | | ADDITIONAL EXHIBITS SUBMITTED AT TIME OF PERSONAL APPEARANCE | | | |
| | | | | TAPE RECORDING OF PERSONAL APPEARANCE HEARING | | | |
| APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONAL ARE DISCUSSED ON THE ATTACHED AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE | | | | | | | |
| REMARKS Case heard at Washington, D.C. * Change narrative reason for discharge to "Personality Disorder" ** Change narrative reason for discharge to "Secretarial Authority" Advise the applicant of the decision of the Board and the right to submit an application to the AFBCMR | | | | | | | |
| SIGNATURE OF RECORDER [REDACTED] | | | SIGNATURE OF BOARD PRESIDENT [REDACTED] | | | | |
| INDORSEMENT | | | | | DATE: 012303 | | |
| TO: SAF/MIBR 550 C STREET WEST, SUITE 40 RANDOLPH AFB, TX 78150-4742 | | | FROM: SECRETARY OF THE AIR FORCE PERSONNEL COUNCIL AIR FORCE DISCHARGE REVIEW BOARD 1535 COMMAND DR, EE WING, 3 RD FLOOR ANDREWS AFB, MD 20762-7002 | | | | |

AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

GENERAL: The applicant appeals for a change to the narrative reason for his separation. The applicant appeared and testified before the Board, with counsel, at Andrews AFB, MD, on January 23, 2003.

The applicant submitted a three-page personal statement, a copy of AF Form 1186 dated October 29, 1998, a copy of a January 17, 2002 mental health evaluation of the applicant by Dr: [REDACTED]; Progress Notes dated October 17, 2002 and December 3, 2002 concerning the applicant by Dr: [REDACTED]; and a mental health report signed by Dr: [REDACTED] and Dr [REDACTED] dated December 18, 2002. All of these items were assembled together and entered into evidence as Exhibit #6.

The attached brief contains the available pertinent data on the applicant and the factors leading to the discharge.

FINDINGS: The applicant's request to change the narrative reason for his separation is denied. The board finds neither the evidence of record nor that provided by the applicant substantiates an inequity or impropriety which would justify the requested change. The applicant raised the following issues for the board's consideration:

Issue #1: The applicant claims his Area Defense Counsel (ADC) did not properly advise him concerning the conditional waiver of his discharge board and the type of characterization he would receive. The DRB noted the waiver the applicant signed provided that, if approved, he would receive no less than an honorable discharge. The governing instruction requires members who submit a conditional waiver to specify the service characterization they will accept (AFI 36-3208, para 6.25). The ADC properly advised the applicant to request the best possible service characterization (viz. honorable). This issue is without merit.

Issue #2: The applicant claims his First Sergeant and Chaplain failed to exercise their proper roles by investigating the homosexual statements he made, reading him his Article 31 rights, and failing to seek medical assistance for him. The DRB noted the applicant requested a meeting with his First Sergeant and Chaplain for the purpose of telling them of his homosexual or bisexual orientation. He told the First Sergeant that he had contemplated suicide because of the conflict he felt over his homosexual feelings. Shortly after the applicant made his admissions, the First Sergeant read the respondent his Article 31 rights. The applicant placed his initials next to statements on the AF Form 1168 indicating he did not want a lawyer and agreed to make a statement that could be used in a later administrative proceeding. The DRB considered whether the First Sergeant should have referred the applicant to mental health or another service provider after he mentioned the possibility of suicide. The DRB noted that the applicant stated the source of his suicidal ideation was the conflict he felt between his claimed homosexual or bisexual lifestyle and his service in the Air Force. However, since his commander did not believe there were any medical issues which would impact his pending separation and the fact a chaplain was present at the time the applicant made his admissions, the DRB did not believe there was an inequity or impropriety in not sending the applicant to a mental health provider. At the DRB, the applicant admitted he intended and expected his statements would be used to effect his separation from the Air Force. Because the applicant intended for his conversation with the First Sergeant and Chaplain to be communicated to others, the DRB did not find a violation of any privilege of confidentiality. For these reasons, the DRB found this issue to be without merit.

Issue #3: The applicant claims his statements to his First Sergeant and the Chaplain did not definitively declare his intention to engage in homosexual conduct. The DRB reviewed the statements and noted the applicant told his First Sergeant that the Air Force was preventing him from pursuing things he needed to be

happy. When asked to explain, the applicant replied he was having thoughts of having sex with a man and that he needed to explore his attraction to men. He added that though he had not yet acted on his feelings, he had a "strong desire" to do so. After being advised of his rights, the applicant wrote a statement in which he revealed that though attracted to women he also had "thoughts regarding sexual and emotional relations with men." He added that he could no longer "deny this lifestyle and be happy." In view of the foregoing, the DRB found this issue to be without merit.

Issue #4: The applicant claims his commander improperly advised him that the worst possible characterization he could receive would be a general discharge. The governing instruction provides that members, like the applicant, who are being discharged for making homosexual statements may receive either an honorable or a general discharge (AFI 36-3208, para 5.37.2). In view of the foregoing, the DRB felt this issue was without merit.

Issue #5: The applicant claims the narrative reason for his separation should be something other than "Homosexual Admission". In deliberating this issue, the DRB carefully considered the applicant's current mental illness, described as schizoaffective disorder, for which he is currently being treated and receives a variety of medications to control his depression; the DRB also considered the impact a change in the narrative reason may have in the applicant's on-going treatment. After carefully reviewing his file, the DRB believed the applicant experienced some degree of gender identity disorder even prior to his entry into military service; however, the DRB could find no evidence indicating the applicant was subject to delusions prior to his separation. The DRB believed the applicant was fully cognizant of his statements to the First Sergeant and Chaplain and that he made the statements acknowledging his homosexual or bisexual orientation with the intention of effecting his discharge, and that his current mental illness evolved after and has been a reaction to his discharge. Therefore, after reviewing all the evidence of record and the applicant's testimony, the DRB concluded the current narrative reason conforms to the evidence and best describes the reason for his separation at the time of his discharge.

The Board also reviewed and considered the applicant's entire service record before making a decision.

CONCLUSIONS: The board concludes there is no legal or equitable basis to change the narrative reason for his discharge.

Attachment:
Examiner's Brief

DEPARTMENT OF THE AIR FORCE
AIR FORCE DISCHARGE REVIEW BOARD
ANDREWS AFB, MD

[REDACTED]

(Former A1C) (HGH A1C)

1. **MATTER UNDER REVIEW:** Appl rec'd a HON Disch fr USAF 98/11/13 UP AFI 36-3208, para 5.36.2.2 (Homosexual Admission). Appeals to Change Reason for Discharge and Reentry Code.

2. **BACKGROUND:**

a. DOB: 74/07/19. Enlmt Age: 22 2/12. Disch Age: 24 3/12. Educ: HS DIPL. AFQT: N/A. A-82, E-96, G-96, M-84. PAFSC: 2A332C - F-16 Avionics Systems Apprentice. DAS: 97/11/01.

b. Prior Sv: (1) AFRes 96/10/16 - 97/02/18 (4 Mos 3 Days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enld as A1C 97/02/19 for 4 yrs. Svd: 1 Yr 8 Mo 25 Das, all AMS.

b. Grade Status: (Discharge in grade enlisted)

c. Time Lost: None.

d. Art 15's: None.

e. Additional: None.

f. CM: None.

g. Record of SV: 97/02/19 - 98/07/15 Cannon AFB 5 (Dir by HAF)

(Discharged from Cannon AFB)

h. Awards & Decs: AFTR, AFEM, AFOUA.

i. Stmt of Sv: TMS: (2) Yrs (0) Mos (28) Das

TAMS: (1) Yr (8) Mos (25) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 02/07/17.
(Change Reason for Discharge and Change the Reentry Code.)

ISSUES ATTACHED TO BRIEF.

FD2002-0322

ATCH

1. Applicant's Issues.
2. Affidavit.
3. Discharge Package.

02/08/12/cr

To the Members of the Discharge Review Board:

[REDACTED] former [REDACTED] is asking that he be reinstated to active duty, or in that alternative that the code used to identify his discharge be re-categorized. There are several reasons why [REDACTED] should be reinstated to active duty or at the minimum have the code for the discharge should be changed.

Presently the discharge code reads as HRC with a reentry code of 3C. [REDACTED] at the time of the "evidence" gathered against him had less than two years active duty service when he was questioned by his First Sergeant regarding his alleged propensity to engage in homosexual acts. The questioning that took place and all that followed was a violation of standing military policy, violation of Air Force Instructions and a violation of his due process rights.

DoD policy at that time was characterized as "don't ask, don't tell," however in his case [REDACTED] was subject to lots of questions without the benefit of counsel or being told the consequences of answering the many questions put to him by the First Sergeant. Included in the file, which we obtained through the Privacy Act and FOIA, is a memorandum by the [REDACTED] First Sergeant [REDACTED] stating that he questioned [REDACTED] in the presence of Chaplain [REDACTED]. It is settled law that the admissions made to a [REDACTED] are privileged and I will not cite the abundance of cases here. However, rather than allow [REDACTED] the opportunity to talk with Chaplain [REDACTED] as he requested, [REDACTED] questioned him in the presence of the Chaplain and under the guise of assisting [REDACTED] as a Chaplain would. The result of course was that [REDACTED] was not there to assist [REDACTED] and instead took a written statement from [REDACTED] again in the presence of Chaplain [REDACTED] concerning homosexual statements. This violation of A1C [REDACTED] due process rights, despite this being an administrative action, against self-incrimination is alone sufficient to return [REDACTED] to active duty or at the minimum to change the coding on his DD 214.

In 1993, the policy concerning homosexuality in the armed forces was debated extensively in the Congress and later signed into law by the President. (Title 10, United States Code, Section 654, 30 Nov 1993) The law was enacted by the Congress under its constitutional powers to make rules for the regulation of land and naval forces. (Article 1, Section 8, Constitution of the United States) Congress prefaced the law with a list of findings upon which the law is based.

Shortly thereafter, the Department of Defense wrote its implementing directives and instructions, followed by the incorporation of the law and DoD policy into Service regulations. (Department of Defense Directives 1304.26 and 1332.14, and Department of Defense Instructions 1332.20, 1332.40 and 5505.8; AFIs 36-3206, 36-3208, 36-3209, 36-2002, 36-2005)

The law is premised on the proposition that sexual orientation alone is not a bar to military service. Although the phrase "don't ask, don't tell" is frequently used to

describe the 1993 policy, it is not a complete or accurate description of the law or the policy, which is far more comprehensive.

Because the policy is premised on the proposition that homosexual orientation alone is not a bar to military service, *so long as homosexual orientation is not accompanied by homosexual conduct*, it follows that asking about sexual orientation is inappropriate. However, once a commander determines there is credible evidence to indicate that a member has engaged in homosexual conduct, to include making a statement of homosexuality, the policy guidance specifically provides that a member can, in an appropriate case, be "asked" about his or her homosexual conduct. (DoD Directives 1332,14 and Department of Defense Instruction 1332.40; AFIs 36-3207, 36-3208 and 36-3209)

To compound the errors made when ██████████ used a Chaplain to ask questions, there was never any investigation done into whether ██████████ "admissions" met with the criteria required by DoD instructions and regulations or with applicable AFI's. The entire discharge was predicated upon the memorandum made and statement taken by ██████████. Each of those pieces of evidence tainted because they were obtained under the guise and in the company of a Chaplain.

A person who has a homosexual orientation can serve in the military so long as he or she does not engage in homosexual conduct. If a member discloses ("tells") his or her homosexual orientation, the member is subject to initiation of separation action. Thus, "don't ask, don't tell" describes a policy whereby a homosexual can serve in the military but only on the condition that he or she does not engage in homosexual conduct, to include making a statement indicating his or her homosexuality ("telling").

However, ██████████ statements were completely ambiguous and do not state that he was a homosexual, or bisexual, or had a propensity to engage in homosexual acts. Indeed, inherent in his statement concerning his continued "unhappiness" is his ability and willingness to comply with Air Force and DoD standards. He states that he has had thoughts and feelings but never identifies himself as being homosexual or bisexual. Also he never admits to any acts or states any intention to participate in any acts, which might have met with the statutory criteria had there ever been an investigation. An investigation, however cursory, would have been better than the effort put forth by this chain of command and JAG office to meet their statutory, and regulatory, obligations.

Another due process problem easily identified within this package is that fact that the squadron commander, in his letter to the separation authority, states that the basis for this discharge includes "homosexual acts", which is blatantly false. Likewise the JA office fails to point out in their legal review this glaring error put in front of the separation authority.

Acts are defined as "A member shall be separated from the AF if evidence is received demonstrating that he or she engaged in, attempted to engage in, or solicited another to engage in a homosexual acts."

Given how this is defined by regulation, it is inconceivable that the squadron commander's did not taint the process when the squadron commander tells the separation authority that ██████████ engaged in homosexual acts, despite there being no evidence of that being true. Again an investigation would have been appropriate but was not done in contravention of regulatory guidance.

Only a commander can initiate a fact-finding inquiry into alleged homosexual conduct by an AF member. *First Sergeants*, supervisors and administrative officers do not have the authority to conduct an inquiry except at the direction of a commander. Before initiating an inquiry, the commander must have credible information that a basis for discharge exists. "Credible information" exists when the information supports a reasonable belief that a member has engaged in homosexual conduct. A commander makes the determination based on articulable facts, not just a belief or suspicion.

This should have been accomplished, instead the only evidence was the First Sergeant's memorandum and the statement he initiated. No commander's inquiry, no due process, and a violation of regulation and policy.

Every military member has a professional obligation not to knowingly violate Air Force policy. Because of the sensitivity of this policy, violations of the policy by commanders or others have caused significant problems for the Air Force. Again, *the policy is conduct based*. Individuals with a homosexual orientation can serve in the military so long as they do not engage in homosexual conduct.

Prior to interviewing the member whose conduct is in question, the member should be advised of the policy on homosexuality in the Armed Forces and in an appropriate case involving a crime, of Article 31 rights. After a rights advisement, a member can only be interviewed if the member waives his or her rights, including the right to remain silent and to counsel. If during the course of an interview an IO suspects that a member who has not previously been advised of his or her rights of an offense under the Uniform Code of Military Justice, the interview should be stopped until an appropriate rights advisement can be given. That is a restatement of Air Force policy regarding questioning of homosexual behavior. Nowhere in ██████████ memorandum, or anywhere else in the discharge package is there a statement by anyone in authority that ██████████ was informed about the policy on homosexuals serving in the military. Indeed he was not informed about the policy, only questioned in the presence of a Chaplain under the guise of spiritual help.

These series of due process violations likewise tainted ██████████ ability to receive competent legal counsel. Since there was no evidence of conduct, or as argued above any competent evidence of homosexual "conduct", ██████████ could *only* receive an honorable discharge as the characterization of his service to the Air Force. Yet

his defense counsel had him waive his entitlement to a discharge board conditioned upon his ability to receive the only discharge that was authorized! There is no conceivable argument that can be made that this was a *knowing and intelligent waiver* by A1C [REDACTED] given the circumstances and his less than two years in the military and his low rank. Another reason to overturn this discharge and return [REDACTED] to duty.

“Credible information” as defined by the regulations is analogous to “probable cause” in a search situation. It must be based on a credible source and be sufficiently specific such that a commander can make a reasonable determination that the member engaged in homosexual conduct. The motives of the person making the report to the commander *and the surrounding circumstances* are relevant to the determination. An investigation into the surrounding circumstances and indeed the manner in which the “evidence” was gathered would have avoided the series of errors and administrative due process violations. The Air Force created the administrative process and created the administrative due process rights for its members. It cannot now, with any serious credibility, allow this series of due process violations to stand and this discharge should be negated and [REDACTED] returned to duty.



FD 2002-0322

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 27th FIGHTER WING (ACC)
CANNON AIR FORCE BASE NEW MEXICO

72 NOV 1998

MEMORANDUM FOR 27 FW/CC

FROM: 27 FW/JA

SUBJECT: Legal Review of Proposed AFI 36-3208 Discharge Action Under AFPD 36-32
[REDACTED]

1. I have reviewed the attached discharge action on [REDACTED] and consider it factually, procedurally, and legally sufficient. The initiating commander recommends discharge for homosexual conduct, specifically, homosexual statements. This case meets the criteria for discharge under AFI 36-3208, paragraph 5.36.2.2 and is supported by a preponderance of the evidence. The commander recommends an Honorable Discharge. This member is entitled to a hearing before an administrative discharge board.

2. DISCUSSION:

a. In support of this action, the commander cites the following reasons: [REDACTED] made an oral statement to Master Sergeant [REDACTED] that he is a homosexual. His statements convey that he attempts to engage in, has a propensity to engage in, and intends to engage in homosexual acts. Statements evidence his homosexual conduct.

b. The respondent's service should be characterized as honorable. His service has generally met Air Force standards of acceptable conduct and performance of duty and any other characterization would be inappropriate. There are no significant negative aspects of his performance that outweigh the positive aspects of his record. Further, his conduct does not meet the required conditions of paragraph 5.37.3 to warrant an under other than honorable conditions characterization. These conditions indicate that an under other than honorable conditions characterization is warranted only if it is found that during the current term of service he attempted, solicited, or committed a homosexual act by using force, coercion, or intimidation; with a person under 16 years of age; with a subordinate in circumstances that violate customary military superior-subordinate relationships; openly in public view; for compensation; aboard a military vessel or aircraft; or in another location subject to military control under aggravating circumstances that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or an aircraft.

c. Separation is warranted because the respondent has failed to rebut the presumption created by his statements that he engages in, has a propensity to engage, or intends to engage in homosexual acts in the future. The respondent is not eligible for probation and rehabilitation since the reason for discharge is paragraph 5.36, Homosexual Conduct.

homosexual acts in the future. The respondent is not eligible for probation and rehabilitation since the reason for discharge is paragraph 5.36, Homosexual Conduct.

d. The respondent elected not to submit a statement after consulting counsel. Instead, he submitted a conditional waiver of his rights to present his case to a discharge board (Tab 2).

3. ERRORS AND IRREGULARITIES: None.

4. OPTIONS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY. You may:

- a. Retain the respondent in the Air Force; or
- b. Accept the respondent's waiver and direct discharge with an Honorable Discharge; or
- c. Reject the waiver and refer the case to a hearing before an administrative discharge board.

If you determine retention or an Honorable Discharge is appropriate, you are the final authority in this matter and your action will result in a final determination.

5. RECOMMENDATION: I find that the reasons listed in the commander's recommendation are sufficient to warrant discharge under AFI 36-3208, paragraph and 5.36.2.2. Accordingly, I recommend that [REDACTED] be discharged from the United States Air Force with an Honorable Discharge without probation and rehabilitation.

[REDACTED]

Attachments

- 1. CC App Ltr
- 2. [REDACTED] Waiver
- 3. Case File



DEPARTMENT OF THE AIR FORCE

HEADQUARTERS 27th FIGHTER WING (ACC)
CANNON AIR FORCE BASE NEW MEXICO

03 NOV 1998

MEMORANDUM FOR [REDACTED]

FROM: 524 FS/CC

SUBJECT: Notification Memorandum -- Board Hearing

1. I am recommending your discharge from the United States Air Force for homosexual conduct, specifically, homosexual statements. The authority for this action is AFPD 36-32 and AFI 36-3208, paragraph 5.36.2.2. Copies of the documents to be forwarded to the separation authority to support this recommendation are attached.

2. My reason for this action is on or about 29 Oct 98, you voluntarily made written and oral statements to Master Sergeant [REDACTED] that you are bisexual, or words to that effect, which statements constitute homosexual conduct. Your statements convey that you either engage in, attempt to engage in, have propensity to engage in, or intend to engage in homosexual acts. Your homosexual conduct is evidenced by your 29 Oct 98 written statement and a Memorandum for Record, dated 3 Nov 98. (Atch 1a).

3. This action could result in your separation with an Honorable or General Discharge. I am recommending that you receive an Honorable Discharge. The commander exercising SPCM jurisdiction or a higher authority will make the final decision in this matter. If you are discharged, you will be ineligible for reenlistment in the Air Force and will probably be denied enlistment in any component of the armed forces. Any special pay, bonuses, or education assistance funds may be subject to recoupment.

4. You have the right to:

- a. Consult legal counsel.
- b. Present your case to an administrative discharge board. You are entitled to present evidence to rebut the presumption that you engage in, attempted to engage in, have the propensity to engage in, or intend to engage in homosexual acts.
- c. Be represented by legal counsel at a board hearing.
- d. Submit statements on your own behalf in addition to, or in lieu of, the board hearing.
- e. Waive the above rights. You must consult legal counsel before making a decision to waive any of your rights.

5. You will complete a medical examination at the 27th Medical Group on _____.

6. Military legal counsel [REDACTED] bldg 327, ext 2915, has been obtained to assist you. An appointment has been scheduled for you to consult him on _____ at _____. Instead of the appointed counsel, you may have another, if the lawyer you request is in the active military service and is reasonably available as determined according to AFI 51-201. In addition to military counsel, you have the right to employ civilian counsel. The Air Force does not pay expenses incident to the employment of civilian counsel. Civilian counsel, if employed, must be readily available.

7. Confer with your counsel and reply, in writing, within 7 workdays, specifying the rights you choose to exercise. The statement must be signed in the presence of your counsel who also will sign it. If you waive your right to a hearing before an administrative discharge board, you may submit written statements in your own behalf. I will send the statements to the discharge authority with the case file to be considered with this recommendation. If you fail to respond, your failure will constitute a waiver of the right to the board hearing.

8. Any personal information you furnish in rebuttal is covered by the Privacy Act of 1974. A copy of AFI 36-3208 is available for your use in your unit orderly room.

9. If you request a board and you fail to appear without good cause, your failure to appear constitutes a waiver of your right to be present at the hearing.

10. Execute the attached acknowledgement and return it to me immediately.



Attachments

- 1a. Respondent's Statement dated 29 Oct 98 and Memorandum for Record dated 3 Nov 98
2. Airman's Acknowledgment