

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

SEP 24 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-02282

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His military personnel records be changed to reflect a sex/gender marker of female.

APPLICANT CONTENDS THAT:

His records bearing the sex/gender marker of female, conflicts with all existing local, state, and federal records creating a situation where his civil, constitutional, and human rights are violated; and the health and welfare of his family are placed in jeopardy.

In support of the appeal, applicant submits a personal statement, Court Order of name change, birth certificate, two affidavits by physicians, Memo Command-Directed Outpatient Mental Health Evaluation, dated 19 May 1997, Record of Non-Judicial Punishment Proceedings, and other documentation.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The applicant's gender as documented in Air Force records was based on the Standard Form 88, Report of Medical Examination, dated 5 October 1978, which was initiated at the time of initial enlistment and the enlistment physical the member received. The applicant provided the information contained in Item 7 of the Standard Form 88 and he listed male under the gender category at the time of the initial physical and entrance processing.

At initial enlistment all personnel are required to complete a Standard Form 93, Report of Medical History, which reflects their assessment of their health and indicating any diseases or injuries they have suffered. He did not answer or respond to the questions listed in item 12 of this form that pertained to females only.

On 27 March 1997, applicant legally changed his name to Mary Ellen Schuler pursuant to an order by the presiding judge for the 45th Civil District Court, Bexar County, Texas. Included in the order was authorization for "public and private agencies with the jurisdiction of the court to amend vital statistic information gender markers from masculine to feminine.."

On 1 May 1997, applicant was directed to undergo a command directed mental health evaluation at Wilford Hall Medical Center, Lackland AFB, TX. He was diagnosed as having a Gender Identity Disorder (GID).

On 13 May 1997, subsequent to his name and gender change in Texas, the Commonwealth of Pennsylvania issued a Certification of Birth, that lists applicant as female.

On 19 May 1997, applicant changed his name in the Defense Eligibility Enrollment Reporting System (DEERS) system; however, his gender was not changed.

On 31 July 1997, in light of the GID diagnosis, the applicant was considered for medical retirement or discharged by a Medical Evaluation Board (MEB). The MEB recommended his return to duty.

The applicant was notified of his commander's intent to impose nonjudicial punishment upon him for appearing in public dressed as a female. Wearing a prosthesis, a long haired women's wig, lipstick, eye make-up, and a woman's blouse, jeans and sandals.

After consulting with counsel, applicant waived his right to a trial by court-martial, requested a personal appearance and submitted a written presentation.

On 14 February 1997, his commander imposed the following punishment: reprimand. Applicant did not appeal the punishment. The Article 15 was filed in his Unfavorable Information File (UIF).

The applicant was notified of his commander's intent to impose nonjudicial punishment upon him for appearing in public dressed as a female. Wearing a long haired women's wig, lipstick, eye make-up, and a woman's blouse, and a women's shorts and slacks with a woman's sandals.

After consulting with counsel, applicant waived his right to a trial by court-martial, requested a personal appearance and submitted a written presentation.

On 4 April 1997, his commander imposed the following punishment: reduction to the grade of technical sergeant, forfeitures of \$300, and a reprimand. Applicant did appeal the punishment. The reduction to technical sergeant was suspended for a period of six months.

On 1 October 1997, applicant was retired in the grade of master sergeant, under the provisions of AFI 36-3203, (Temporary Early Retirement Authority). He served 18 years, 9 months and 18 days total active duty with no lost time.

AIR FORCE EVALUATION:

The Records Procedures Branch, Directorate of Customer Assistance, HQ AFPC/DPSRP, reviewed this application and states that the Standard Form 88 and Standard Form 93 initiated at the time of initial enlistment and the results of the physical examination given to all inductees where the gender is determined and documented lists the applicant's sex as male. He has not presented any evidence to indicate a sex change operation has been initiated or successfully concluded that would thereby make the gender as currently recorded in his master personnel records inaccurate. The gender as initially recorded based on the information volunteered by the applicant, the presence of external male genitalia noted during the physical examination, and accepted medical standards used to classify and distinguish male and female personnel appear to have followed and allowed for the male gender to be accurately recorded in his records. Since the applicant has failed to provide the results of a recent physical examination or any evidence that supports the results of a successful sex change operation having occurred we must presume the gender as recorded in the master personnel record is correct. Therefore, they recommend denial of applicant's request.

A complete copy of the Air Force evaluation, with attachments, is attached at Exhibit C.

The Staff Judge Advocate, HQ AFPC/JA, reviewed this application and states that while the applicant has been diagnosed with gender identity disorder, a form of mental illness, he is genetically and physically male. Gender identity disorder does not affect applicant's biological sex; it affects his perception of his sex. In other words, applicant thinks he is a woman, acts like a woman, and, therefore, psychologically applicant is a woman, but only in mind, not in body. Air Force records correctly reflect that applicant is male. Since applicant is biologically male, the use of the male marker in his records in no way violates any recognized civil, constitutional, or human right.

With regard to the court order changing applicant's gender; we believe it has no relevance to his military records. First, the military personnel records are not subject to the jurisdiction of the 45th Civil District Court of Bexar County, Texas. Changes in military records can only be made by appropriate military authorities, statutory changes by Congress, or by order of an

appropriate federal court. State courts have no such jurisdiction. Second, even if the court order were applicable to Air Force records, it does not require agencies within its jurisdiction to change records; it authorizes them to change records. There are significant differences between a judicial order that requires action and a judicial order that authorizes action. Thus, even if the court had jurisdiction to authorize a change in applicant's records, the court did not require such a change.

The applicant's petition related to his service at the time of the application, the wear of women's clothing off-duty, women's uniform items, etc. Since applicant has retired from active duty, those portions of his application are no longer relevant; however, it is their opinion that applicant's commander acted correctly and with legal authority in issuing applicant orders to dress as a male. As a result, they believe the disciplinary actions taken by the commander to have been appropriate. Therefore they recommend denial of applicant's request.

A complete copy of their evaluation is attached at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the evaluation and states that his legal gender is female as evident by the ruling of the Bexar County Court, and substantiated by the State of Texas which issued an amended driver's license, the Commonwealth of Pennsylvania which issued an amended birth certificate, the Federal Government which amended the social security account, and two medical affidavits. The applicant states that he was retired on 1 October 1997, as a female with his military identification card and military medical records reflecting his gender as female.

A complete copy of applicant's response is attached at Exhibit F.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After reviewing the evidence of record, we are not persuaded that applicant's military records should be change to reflect a sex/gender marker of female. The detailed comments provided by the appropriate Air Force offices appear to accurately address

applicant's contentions. In view of the above findings, we agree with the opinions and recommendations of the Air Force and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. Therefore, we find no compelling basis to recommend granting the relief sought in this application.

4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 28 July 1998, under the provisions of AFI 36-2603:

Mr. Michael P. Higgins Panel Chair
 Dr. Gerald B. Kauvar, Member
 Mr. Allen Beckett, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 29 Jul 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPSRP, dated 10 Aug 97, w/atchs.
- Exhibit D. Letter, HQ AFPC/JA, dated 14 Nov 97.
- Exhibit E. Letter, SAF/MIBR, dated 1 Dec 97.
- Exhibit F. Applicant's Response, dated 15 Dec 97, w/atchs.


 MICHAEL P. HIGGINS
 Panel Chair

10 AUG 1987

MEMORANDUM FOR AFBCMR

FROM: DPSRP

SUBJECT: Application for Correction of Military Records [REDACTED]

After review of application we recommend the requested action be denied.

REQUESTED ACTION: Member wants sex/gender marker of male on master personnel record and master personnel files changed to reflect female.

BASIS FOR THE REQUEST: Member believes master-personnel record and files are incorrect as they list male as gender based solely on the presence of external male genitalia and do not take into account the members' mental, emotional and psychological female orientation.

FACTS:

[REDACTED] entered the Air Force as a male and under his original birth name of [REDACTED] gender as documented in Air Force records was based on the enclosed Standard Form 88, Report of Medical Examination, dated 5 October 1978, which was initiated at the time of initial enlistment and the enlistment physical the member received. The applicant for military service provides the information contained in Item 7 of the Standard Form 88, [REDACTED] listed male under the gender category at the time of the initial physical and entrance processing. Additionally, at initial enlistment all personnel are required to complete a Standard Form 93, Report of Medical History, which reflects their assessment of their health and indicating any diseases or injuries they have suffered. A copy of the original Standard Form 93 from [REDACTED] master personnel record is enclosed. It is noted [REDACTED] did not answer or respond to the questions listed in Item 12 of this form which pertained to females only.

DISCUSSION: It is our opinion the application should be denied.

The Standard Form 88 and Standard Form 93 initiated at the time of initial enlistment and the results of the physical examination given to all inductees where the gender is determined and documented lists [REDACTED]'s sex as [REDACTED] has not presented any evidence to indicate a sex change operation has been initiated or successfully concluded that would thereby make the gender as currently recorded in his master personnel records inaccurate. The gender as initially recorded based on the information volunteered by the [REDACTED]

the presence of external male genitalia noted during the physical examination, and accepted medical standards used to classify and distinguish male and female personnel appear to have followed and allowed for the male gender to be accurately recorded in his master personnel records.

Since [REDACTED] has failed to provide the results of a recent physical examination or any evidence which supports the results of a successful sex change operation having occurred we must presume the gender as recorded in the master personnel record is correct. Therefore we believe the application should be denied.



WILLIAM A. TOOLES, MSgt, USAF
NCOIC, Records Procedures Branch
Directorate of Customer Assistance

Attachments:

1. SF 88, 5 Oct 78
2. SF 93, 5 Oct 78

REPORT OF MEDICAL EXAMINATION

88-117

1. LAST NAME—FIRST NAME—MIDDLE NAME [REDACTED]			2. GRADE AND COMPONENT OR POSITION [REDACTED]		3. IDENTIFICATION NUMBER [REDACTED]		
4. HOME ADDRESS (Include Apt., Street or R.F.D., City or Town, State and ZIP Code) [REDACTED]			5. PURPOSE OF EXAMINATION Enlar		6. DATE OF EXAMINATION OCT 05 1978		
7. SEX MALE	8. RACE CAUC	9. TOTAL YEARS GOVERNMENT SERVICE MILITARY NONE CIVILIAN NONE		10. AGENCY		11. ORGANIZATION UNIT	
12. DATE OF BIRTH [REDACTED]		13. PLACE OF BIRTH [REDACTED]		14. NAME, RELATIONSHIP, AND ADDRESS OF NEXT OF KIN			
15. EXAMINING FACILITY OR EXAMINER, AND ADDRESS [REDACTED]				16. OTHER INFORMATION			
17. RATING OF PERFORMANCE				TIME IN THIS CAPACITY (Total)		LAST SIX MONTHS	

CLINICAL EVALUATION		
NOR.	(Check each item in appropriate column)	MAL
MM	um, enter "NE" if not evaluated	
/	18. HEAD, FACE, NECK AND SCALP	
/	19. NOSE	
/	20. SINUSES	
/	21. MOUTH AND THROAT	
/	22. EARS—GENERAL (For Eustachian canals; Auditory acuity under items 20 and 21)	
/	23. DRUMS (Perforation)	
/	24. EYES—GENERAL (Visual acuity and refraction under items 20, 20 and 21)	
/	25. OPHTHALMOSCOPIC	
/	26. PUPILS (Equality and reaction)	
/	27. OCULAR MOTILITY (Associated paralytic movements, nystagmus)	
/	28. LUNGS AND CHEST (Include breasts)	
/	29. HEART (Thrust, size, rhythm, sounds)	
/	30. VASCULAR SYSTEM (Arteriosclerosis, etc.)	
/	31. ABDOMEN AND VISCERA (Include hernia)	
/	32. ANUS AND RECTUM (Hemorrhoids, fistula; Prostate, if indicated)	
/	33. ENDOCRINE SYSTEM	
/	34. G. U. SYSTEM	
/	35. UPPER EXTREMITIES (Strength, range of motion)	
/	36. FEET	
/	37. LOWER EXTREMITIES (Except feet) (Strength, range of motion)	
/	38. SPINE, OTHER MUSCULOSKELETAL	
/	39. IDENTIFYING BODY MARKS SCARS, TATTOOS	
/	40. SKIN, LYMPHATICS	
/	41. NEUROLOGIC (Equilibrium tests under item 22)	
/	42. PSYCHIATRIC (Nervousness, personality deviation)	
/	43. PELVIC (Females only) (Check how done)	
	<input type="checkbox"/> VAGINAL <input type="checkbox"/> RECTAL	

NOTES (Describe every abnormality in detail. Enter pertinent item number before each comment. Continue if item 73 and use additional sheets if necessary.)

1. INDEX FINGER - R. LEG - R. HAND - LEFT CORNER NAIL
 R. ANAT LOFL PALM + R. THUMB

(Continue in item 73)

44. DENTAL (Place appropriate symbols, shown in examples, above or below number of upper and lower teeth.)																	REMARKS AND ADDITIONAL DENTAL DEFECTS AND DISEASES				
												<div style="border: 1px solid black; padding: 5px; text-align: center;"> DENTAL EXAMINATION NOT DONE BY DENTAL OFFICE </div>									
R	1	2	3	4	5	6	7	8	9	10	11					12	13	14	15	16	L
G	32	31	30	29	28	27	26	25	24	23	22					21	20	19	18	17	F
H																					T

45. URINALYSIS - A SPECIFIC GRAVITY				LABORATORY FINDING				46. [REDACTED] and [REDACTED]			
B. ALBUMIN				D. MICROSCOPIC				APRS 401 N. BROAD ST., PHILA PA			
C. SUGAR				E. [REDACTED]				APR 05 1978			
47. [REDACTED]				48. EKG				49. BLOOD TYPE AND RH			
CDU TEST				[REDACTED]				50. OTHER TESTS			

MEASUREMENTS AND OTHER FINDINGS

51. HEIGHT 72 52. WEIGHT 178 53. COLOR HAIR Brown 54. COLOR EYES Brown 55. BUILD: SLENDER MEDIUM HEAVY OBESSE 56. TEMPERATURE

57. BLOOD PRESSURE (A/F/M of heart beat) 58. PULSE (A/F/M of heart beat)

A. SITTING	SYS. <u>120</u>	DIAS. <u>80</u>	B. RECUMBENT	SYS.	DIAS.	A. SITTING	74	B. AFTER EXERCISE	C. 2 MIN. AFTER	D. RECUMBENT	E. AFTER STANDING 3 MIN.
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59. DISTANT VISION 60. REFRACTION 61. NEAR VISION

RIGHT 20' 400 CORR. TO 20' BY 6.00 S. sphere CR J-9 CORR. TO J-1 BY

LEFT 20' 400 CORR. TO 20' BY 5.00 S. sphere CR J-9 CORR. TO J-1 BY

62. METEOROPHORIA (Specify distance)

ES° EX° R. H. L. H. PRISM DIV. PRISM CONV. CT PC PD

63. ACCOMMODATION 64. DEPTH PERCEPTION (Test near and eyes) 65. RED LENS TEST 66. FIELD OF VISION 67. INTRAOCULAR TENSION

RIGHT LEFT PIP 1/19/1960 1960 ANSI 1960 UNCORRECTED CORRECTED

70. HEARING 71. AUDIOMETER 72. PSYCHOLOGICAL AND PSYCHOMOTOR (Test near and score)

RIGHT WV	/15 SV	/15	250 250	500 510	1000 1000	2000 2000	3000 3000	4000 4100	5000 5100
LEFT WV	/15 SV	/15	RIGHT	5	5	5	5	5	10
			LEFT	5	5	5	5	5	10

73. NOTES (Continued) AND SIGNIFICANT OR INTERVAL HISTORY

AFES, HILA, PA. 12 Oct 78
 NO DISQUALIFYING DEFECTS OR COMMUNICABLE DISEASES WERE NOTED THIS DATE.
 SIGNATURE MEDICAL OFFICER

DATE	HT	WT	DOCTOR
13 Dec 78	72	178	[Signature]

(Use additional sheets if necessary)

74. SUMMARY OF DEFECTS AND DIAGNOSES (List diagnoses with item numbers)

546 VA E2

75. RECOMMENDATIONS—FURTHER SPECIALIST EXAMINATIONS INDICATED (Specify)

76. A. PHYSICAL PROFILE

P	U	L	H	E	S
/	/	/	/	/	/

B. PHYSICAL CATEGORY

A	B	C	E
/	/	/	/

77. EXAMINEE (Check)
 IS QUALIFIED FOR
 IS NOT QUALIFIED FOR AF

78. IF NOT QUALIFIED, LIST DISQUALIFYING DEFECTS BY ITEM NUMBER

79. TYPED OR PRINTED NAME OF PHYSICIAN GEORGE ISAJW MD. SIGNATURE [Signature] DATE OCT 05 1978

80. TYPED OR PRINTED NAME OF PHYSICIAN SIGNATURE

81. TYPED OR PRINTED NAME OF DENTIST OR PHYSICIAN (Indicate which) SIGNATURE

OCT 05 1978 TACHED SHEETS

YES	NO	CHECK EACH ITEM YES OR NO. EVERY ITEM CHECKED YES MUST BE FULLY EXPLAINED IN BLANK SPACE ON RIGHT
X		15. Have you been refused employment or been unable to hold a job or stay in school because of: A. Sensitivity to chemicals, dust, sunlight, etc.
X		B. Inability to perform certain motions.
X		C. Inability to assume certain positions.
X		D. Other medical reasons (If yes, give reasons.)
X		16. Have you ever been treated for a mental condition? (If yes, specify when, where, and give details.)
X		17. Have you ever been denied life insurance? (If yes, state reason and give details.)
X		18. Have you had, or have you been advised to have, any operations? (If yes, describe and give age at which occurred.)
X		19. Have you ever been a patient in any type of hospital? (If yes, specify when, where, why, and name of doctor and complete address of hospital.)
X		20. Have you ever had any illness or injury other than those already noted? (If yes, specify when, where, and give details.)
X		21. Have you consulted or been treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses? (If yes, give complete address of doctor, hospital, clinic, and details.)
X		22. Have you ever been rejected for military service because of physical, mental, or other reasons? (If yes, give date and reason for rejection.)
X		23. Have you ever been discharged from military service because of physical, mental, or other reasons? (If yes, give date, reason, and type of discharge: whether honorable, other than honorable, for unfitness or unsuitability.)
X		24. Have you ever received, is there pending, or have you applied for pension or compensation for existing disability? (If yes, specify what kind, granted by whom, and what amount, when, why.)

I certify that I have reviewed the foregoing information supplied by me and that it is true and complete to the best of my knowledge. I authorize any of the doctors, hospitals, or clinics mentioned above to furnish the Government a complete transcript of my medical record for purposes of processing my application for this employment or service.

TYPED OR PRINTED NAME OF EXAMINEE

SIGNATURE

NOTE: HAND TO THE DOCTOR OR NURSE, OR IF MAILED MARK ENVELOPE TO BE OPENED BY MEDICAL OFFICER ONLY.

25. Physician's summary and elaboration of all pertinent data (Physician shall comment on all positive answers in items 9 through 24. Physician may develop by interview any additional medical history he deems important, and record any significant findings here.)

- JCM
 - F. + both wrists
 - anxieties
 - occ. headaches related to sunlight
 - postural dyspnea

TYPED OR PRINTED NAME OF PHYSICIAN OR

DR. GEORGE ISAIW MD.

DATE

OCT 05 1970

SIGNATURE

[Handwritten Signature]

NUMBER OF

ATTACHED SHEETS



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

U.S. AIR FORCE

1947 • 1997

14 November 1997

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA (Major Reed)
550 C Street West Suite 44
Randolph AFB TX 78150-4746

SUBJECT: Application for Correction of Military R i: [REDACTED]

After review of subject application, we recommend the requested action be denied.

REQUESTED ACTION: The applicant requests that his military master personnel records be changed to reflect a sex/gender marker of female rather than the current sex/gender marker of male.

BASIS FOR REQUEST: The applicant claims his records, bearing the sex/gender marker of male, conflict "with all existing local, state, and federal records" creating a situation where his "civil, constitutional, and human rights are unnecessarily violated; the health and welfare of his "family is placed in needless jeopardy; and" his "overall effectiveness as a productive member of the Air Force is limited due to the resultant application of an inappropriate standard." We disagree.

FACTS:

[REDACTED] applicant, was born [REDACTED], on 21 Dec 60. Applicant was born male. Subsequently, applicant entered the United States Air Force as a male on 12 Oct 78. He was retired in the grade of master sergeant (E-7) on 1 Oct 97.

On 27 Mar 97, applicant legally changed his name to [REDACTED] pursuant to an order by the presiding judge for the 45th Civil District Court, [REDACTED]. Included in the order was authorization for "public and private agencies within the jurisdiction of [the] court" "to amend vital statistics information gender markers from masculine to feminine" Subsequent to his name/gender change in [REDACTED], the Commonwealth of [REDACTED] issued a Certification of Birth on 13 May 97, that lists applicant as female.

On 19 May 97, applicant changed his name in the DEERS system; however, his gender was not changed. The **refusal** to change his gender is the basis of this appeal.

All available medical evidence suggests that applicant is still biologically, and genetically, male.

DISCUSSION: This application was timely filed. Nevertheless, it should be denied.

While he has been diagnosed with gender identity disorder, a form **of mental** illness, applicant is genetically and physically male. Gender identity disorder does not affect applicant's biological sex; it affects his perception of his sex. In other words, applicant thinks he is a woman, acts like a woman, and, therefore, psychologically applicant is a woman, but only in mind, not in body. Air Force records correctly reflect that applicant is male. Since applicant is biologically male, the use of the male marker in his records in no way violates any recognized civil, constitutional, or human right.

It is a long-standing proposition that a military member's records reflect the gender/sex under which he or she served. The Air Force has never changed military records to reflect a change in gender, and, **as** recently **as** 31 Jul 95, the Marines and Navy had also not changed gender records to conform with a sex change situation. The Army had not at that time addressed the issue. Indeed, in Ulane v. Eastern Airlines, Inc., 742 F. 2d 1081(7th Cir. 1984), the court speculated that even in cases of sex change operations a person cannot change their biological gender. Applicant's personal contusion over gender identity may lead the psychiatrists to diagnose gender identity disorder, but that does not change the fact that applicant is biologically and genetically a male, that applicant served in the military **as** a male, and that applicant, even with sex change surgery, will always be biologically and genetically male.

With regard to the court order changing applicant's gender, we believe it has no relevance to his military records. First, the military personnel records of the United States Air Force are not subject to the jurisdiction of the 45th Civil District Court of ██████████. Changes in military records can only be made by appropriate military authorities, statutory changes by Congress, or by order of an appropriate federal court. State courts have no such jurisdiction. Second, even if the court order were applicable to Air Force records, it does not require agencies within its jurisdiction to change records; it authorizes them to change records. There is significant difference between a judicial order which requires action and a judicial order which authorizes action. Thus, even if the court had jurisdiction to authorize a change in applicant's records, the court did not require such a change.

We note that much of applicant's petition related to his service at the time of the application — the wear of women's clothing off-duty, women's uniform items, etc. Since applicant has retired from active duty, those portions of his application are no longer relevant; however, it is our opinion that applicant's commander acted correctly and with legal authority in issuing applicant orders to dress **as** a male. As a result, we believe the disciplinary actions taken by the commander to have been appropriate.

In our opinion, there is no error or injustice in applicant's military records. For the foregoing reasons, we urge the Board to deny the application.



**ALLEN B HORPE, Colonel, USAF
Staff Judge Advocate**





DEPARTMENT OF THE AIR FORCE
HEADQUARTERS Air Force Military Personnel Center
RANDOLPH AIR FORCE BASE TEXAS

7 July 1995

MEMORANDUM FOR DPSTS

FROM: HQ AFMPC/JA (Lt Col Posey)
550 C Street West, Suite 44
Randolph AFB TX 78150-4746

SUBJECT: Legal Opinion on Change of Gender in DEERS—Retired SSgt [REDACTED]

You have asked our legal opinion on whether the gender of [REDACTED] SSgt, USAF (retired) can be changed in DEERS from male to female. We concur with your opinion that his name can be changed, but we find no basis for changing his sexual designation.

As we understand the facts, the DEERS Support Office received documents from Palm Springs Government Benefits Administrators regarding the correct name and gender of SSgt [REDACTED]. They, in turn, asked that you coordinate with the Defense Finance and Accounting Service to correct SSgt [REDACTED] record in DEERS. The documentation sent to you includes a state court order changing SSgt [REDACTED] name from David Edward [REDACTED] to [REDACTED], a social security card and a military ID card (DD Form 2 (retired)) issued in the name of [REDACTED] and an Arizona driver's license and a Medicare health insurance card bearing the name [REDACTED] and designating him as female.

Insofar as a name change is concerned, the controlling AFI is 36-2608 (Military Records), as opposed to AFI 36-3001 (ID Cards). The Air Force has provided for a retiree to change his or her name by court order (AFI 36-2608, table A7.2, rule 1). The supporting documentation is sent to HQ AFMPC/DPMDOA (table A7.3, rule 5). Recommend sending the file to such office.

However, the Air Force has made no provision for changing an active, reserve, or retired member's gender in its records. Our review of the law has not revealed a statute or case on point. The majority of federal court cases in the area deal with alleged discrimination against transsexuals—usually by employers, who are alleged to have violated Title VII of the Civil Rights Act of 1964 by firing the individual after he/she has undergone a sex change operation. The majority of courts that have considered the issue have held that transsexuals are not a protected class under the Act and that the term "sex" does not include transsexuals (see, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) and Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977)). In other words, while an employer cannot discriminate against an employee because of the latter's sex (e.g., firing an employee because she is female), the employer can fire the employee because of his/her practices that grow out of transsexualism. In Ulane, the Seventh Circuit noted the disparity in an opinion as to whether a male can change

his gender, noting that biologically he cannot, whereas cosmetically or anatomically he can. However, the court declined to decide for purposes of that particular case whether Ulane was male or female. While such case law is not dispositive of the issue before us, it is instructive. [REDACTED] continues to be treated as all other males who served on active duty and have now entered the retired rolls of the Air Force. Based on the discussion above, it is our opinion that the Air Force is not legally required to recognize a transsexual's sex change. Furthermore, neither the Department of Defense or Air Force policy provides for such recognition. Accordingly, we recommend that you deny [REDACTED] request to change gender designation from male to female.

[Handwritten signature]
 [REDACTED]