

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-02235

COUNSEL: [REDACTED]

HEARING DESIRED: YES

OCT 30 1997

APPLICANT REQUESTS THAT:

The Officer Performance Reports closing 12 January 1994 and 8 January 1995 be corrected to reflect "Meets Standards" in every block on the front side and all references to sexual orientation be deleted from Sections VI and VII.

APPLICANT CONTENDS THAT:

The reasons the applicant believes the records to be in error or unjust and the evidence submitted in support of the appeal are at Exhibit A.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the letter prepared by the appropriate office of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Chief, Evaluation Procedures Section, AFMPC/DPPPEP, reviewed the application and states that the comments in question are specific and they tell the behavior and the results of the behavior. The OPRs are considered an accurate assessment of performance at the time they were rendered. They recommend the request be denied.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Appeals and SSB Branch, AFPC/DPPPA, reviewed the application and states that to effectively challenge OPRs, it is

important to hear from all the evaluators from the reports—not only for support, but for clarification/explanation. In applicant's case, he does not have support of any evaluators from the contested reports. According to the rating chain, applicant's admission of homosexuality rendered him unable to accomplish his primary mission and made him incompatible for military service. Applicant had his security clearance and flying status suspended as a result of his admission of homosexuality. This made him unable to perform his duties. Applicant's counsel states that applicant's "announcement of his sexual orientation did not require that his security clearance be rescinded." They agree; there was no requirement to remove applicant's security clearance, but that fact alone does not invalidate the action. The commander had it within his discretion to determine the applicant's state of mind and character in rendering that judgment. They find it logical that the applicant's apparent lack of candor with the Air Force would cause his commander concern regarding his security status. While the applicant believes the comments in the narrative portion of the reports are vague, they do not concur with his assessment. The comments speak to the specific behavior and the results are quite clear and are in complete accordance with Air Force policy. While the applicant states the reports address certain information being considered by a board of inquiry, they, in fact, do not address any pending action but address "behavior incompatible with minimum standards of personal conduct." The board of inquiry is not mentioned in the report, nor is anything that could be considered "pending." The reports appear to be written in complete accordance with Air Force policy in effect at the time they were rendered.

Counsel states "[applicant's] sexual orientation has nothing to do with his performance." The consistent theme throughout applicant's case and in his counsel's brief is that duty performance is all that should be reflected on an OPR. They (applicant/counsel) believe the reports are invalid because they address information outside the applicant's performance of his specific job. They do not agree with these statements. While a ratee's duty performance is a large portion of an OPR, officership traits, off-duty behavior, character, integrity, and other intangible characteristics and behaviors influence the report. The "whole-person" concept is used by both evaluators and promotion boards. Applicant was marked down in the sections dealing with leadership skills, professional qualities, and judgment and decisions. Information other than specific duty performance would be appropriate determinants in these sections.

Contrary to counsel's assertions of evaluator bias, they find absolutely no evidence of prejudicial behavior or treatment regarding the assessment of applicant's performance on the contested reports. It appears that the raters made carefully considered comments and assessed applicant's performance objectively in accordance with Air Force policy.

While counsel states that this case goes to the core and integrity of the officer evaluation system, they point out that when applicant entered into the military, he had to concur that he was not a homosexual. They believe applicant would be better served employing arguments that do not address integrity, as he apparently gave fraudulent information to military officials. Evidence has not been provided that convinces them there was inappropriate information or intent in the rendering of the reports. Therefore, they recommend denial of the application.

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

APPLICANT'S RESPONSE TO AIR FORCE EVALUATION:

Complete copies of the Air Force evaluations were forwarded to counsel on 18 March 1996 for review and response within 30 days. No response was received by this office.

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Evaluation Procedures Section, AFPC/DPPPEP, reviewed the application and states that the governing regulation states that when reports are referred, the evaluator "...must specifically detail the behavior or performance causing the referral in his or her comment." Generic terms such as "personal preference" or even "sexual orientation" are not specific enough; one would have to guess if the comment referred to heterosexuality, bisexuality, or homosexuality. The requirement to be specific is meant to prevent any possible misunderstanding of what is stated. Use of the term "homosexual" meets regulatory requirements and is appropriate. Reports using less explicit terminology which could lend itself to misinterpretation would not be accepted for file; they would be returned for reaccomplishment to include more specific terms.

Regarding the question of whether the comments are discriminatory in nature, the vagueness of the question itself makes it difficult to answer. If the inferred question is, would personnel reviewing applicant's records for assignments and such discriminate against him, that is, base their decisions on his homosexuality instead of solely on qualifications, they believe it's possible, even probable, given the knowledge that homosexuality is not in accordance with Air Force standards. If the inferred question is, is it unfair to mention the admitted homosexuality, the answer is no, it is merely reporting a stated fact from a reliable source (applicant). In summary, the terms "homosexual" and "homosexual orientation" meet regulatory guidance and are appropriate for inclusion in performance reports. They recommend the reports remain in applicant's record.

A complete copy of the evaluation is attached at Exhibit F.

The Staff Judge Advocate, AFPC/JA, reviewed the application and states that AFR 36-10 (Officer Evaluation System, dated 1 August 1988) was the regulation which governed the preparation of the OPRs in question. In their opinion, mention of an admission of homosexuality does not fall within any of the proscribed categories of comments which may not be considered or referred to by evaluators. They interpret the plain language of the regulation to have created a specific list of prohibited comments and since there is no mention of sexual orientation on the list of prohibited comments, they believe such comments are permitted. They note that certain comments are mandatory when an OPR is referred. As the DPPPEP advisory points out, AFR 36-10 requires specificity in order to prevent misunderstanding, and allow for focused, meaningful rebuttal. The regulation is explicit, stating in part: "The evaluator who causes an OPR to be referred must specifically detail the behavior or performance causing the referral in his or her comments." They believe the applicant's self-admitted status of being a homosexual to be appropriate comment in an OPR under the applicable regulation.

A complete copy of the evaluation is attached at Exhibit G.

APPLICANT'S RESPONSE TO THE ADDITIONAL AIR FORCE EVALUATION:

Counsel reviewed the Air Force evaluations and states that the advisories fail to address the matters he raised in his 27 January 1995 letter to [REDACTED] at Randolph AFB. The opinions also miss the point and purpose of the AFR 36-10 in effect with respect to the OPRs rendered on applicant. The Board will have to ask themselves what applicant's sexual orientation has to do with his performance as an Air Force officer. Before his sexual orientation became disclosed, his OPRs were uniformly outstanding. When his sexual orientation was disclosed, he failed to meet standards in the OPRs before the Board. Contrary to AFR 36-10, paragraph 3-9, the evaluator fails to "specifically detail the behavior of performance causing the referral in his or her comments." The reason is that there is nothing in applicant's behavior or performance to justify the ratings of the evaluator.

One need not indulge in wild speculation to understand what is at work in these OPRs. Applicant advised his commander, the evaluator, of his sexual orientation. The evaluator referred applicant to a Board convened pursuant to AFR 36-2 for possible discharge. It is not too much of a stretch to understand the evaluator considered the possibility of the Board retaining applicant in the Air Force. In that event, the evaluator well understood that stating applicant's sexual orientation in an OPR would have an adverse effect on further promotion opportunities.

The evaluator conceded that if applicant were retained, the OPR would "kill" his career.

The evaluator's prejudice with respect to homosexuals serving in the Air Force is clear. During the Board, the evaluator was asked "Would you agree with me that you prefer not to have-see homosexuals in the United States Air Force, sir? Answer: Yes."

The advisory opinions do not meet the issue of applicant's performance. Knowing applicant's sexual orientation, or, for that matter, the color of his eyes, or the fact that he is left handed or right handed, tells the reader absolutely nothing about the manner in which applicant performs his duties as an Air Force officer.

Counsel's complete response is attached at Exhibit I.

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 thoroughly reviewing the evidence of record, we are not persuaded that applicant has been the victim of either an error or an injustice. Counsel's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale expressed by the Air Force. It appears that the comments used by the evaluators to describe applicant's sexual orientation were specific, accurate, and in compliance with the governing regulation. Counsel argues that applicant's sexual orientation has nothing to do with his duty performance; however, we note that the Air Force states that the "whole person" concept is used by both evaluators and promotion boards. The applicant was marked down in sections dealing with leadership skills, professional qualities, and judgment and decisions. Clearly, information other than specific duty performance would be appropriate factors to consider in these sections. We note that the applicant has not submitted any supporting documentation from the rating chain and has failed to provide evidence showing that the reports were not accurate assessments as rendered. Therefore, we agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our conclusion that the applicant has failed to sustain his burden of establishing the existence of either an error or an injustice.
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:

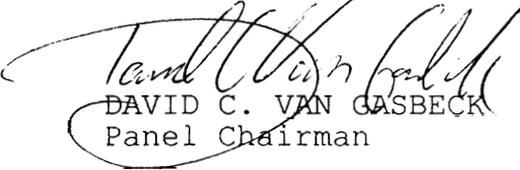
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence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

The following members of the Board considered this application in Executive Session on 13 February 1997 and 25 September 1997, under the provisions of AFI 36-2603:

Mr. David C. Van Gasbeck, Panel Chairman
Mr. Michael P. Higgins, Member
Ms. Sophie A. Clark, Member

The following documentary evidence was considered:

- Exhibit A, DD Form 149, dated 5 Jul 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPPPEP, dated 25 Aug 95.
- Exhibit D. Letter, AFPC/DPPPA, dated 28 Feb 96.
- Exhibit E. Letter, AFBCMR, dated 18 Mar 96.
- Exhibit F. Letter, AFPC/DPPEP, dated 16 Apr 97.
- Exhibit G. Letter, AFPC/JA, dated 18 Apr 97.
- Exhibit H. Letter, AFBCMR, dated 10 Jun 97.
- Exhibit I. Counsel's response, dated 30 Jul 97.


DAVID C. VAN GASBECK
Panel Chairman