



# AF Board for Correction of Military Records (AFBCMR)

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## AFBCMR Overview

### 32nd Annual Judicial Conference

### United States Court of Federal Claims



Ms. Nicole Jackson  
Executive Director, AFBCMR

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# AFBCMR in the News



## Air Force grants honorable discharge to 91-year-old gay vet

Published January 09, 2017 · Associated Press

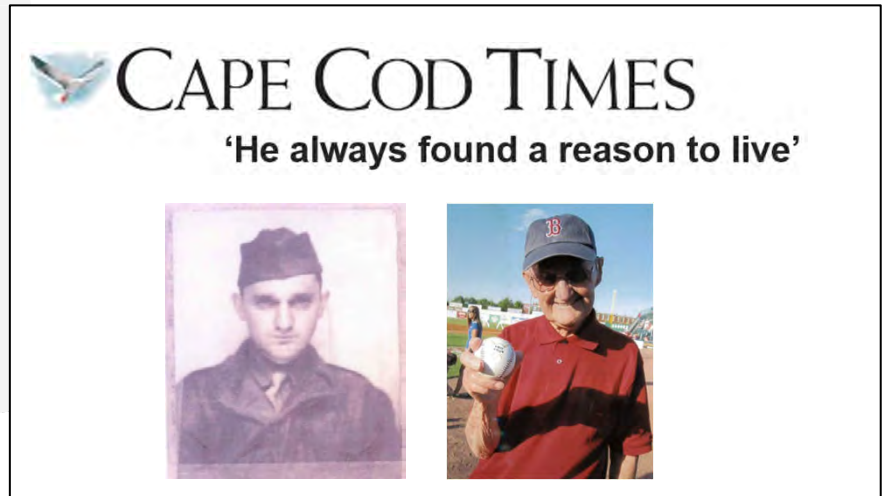


Advertisement

NEW HAVEN, Conn. — A 91-year-old veteran who was dismissed from the U.S. Air Force as "undesirable" in 1948 because he is gay has had that discharge status changed to "honorable."

The move by the Air Force comes in response to a lawsuit filed in November by H. Edward Spires of Norwalk, Connecticut, who served from 1946 to 1948 as a chaplain's assistant, earning the rank of sergeant.

Spires was forced out of the military in 1948 after an investigation into his sexual orientation.



## Powers, U-2 Pilot Captured by Soviets, Awarded Silver Star

By REBECCA BERG · JUNE 15, 2012

WASHINGTON — More than 50 years after his plane was downed in the Soviet Union, Francis Gary Powers was posthumously awarded the military's third-highest decoration on Friday.

Mr. Powers, the U-2 spy plane pilot whose story captured national attention during the cold war, was awarded a Silver Star from the [Air Force](#) in a ceremony at the Pentagon.

After his plane was downed in 1960, Mr. Powers was subjected to 107 days of [interrogation](#), followed by a public trial in Moscow. He was imprisoned for more than two years thereafter.



In March 1962, Francis Gary Powers faced a Senate committee in his first public appearance after his release by the Russians.  
Associated Press



# AF Board for Correction of Military Records



**10 USC sec. 1552(a)(1):** The Secretary of a military department may correct *any military record of the Secretary's department* when the Secretary considers it necessary to correct an error or remove an injustice ... such corrections shall be made by the Secretary **acting through boards of civilians** of the executive part of that military department

- Is there an error or injustice in an Air Force-generated record?
- Have administrative remedies been exhausted? (example: Remissions)
- Discovered within 3 years
- Common requests: Transgender name changes, post-DADT & other discharge upgrades, SBP, promotion actions, medical retirements



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# AF Board for Correction of Military Records



- **AFBCMR receives on average 5000+ cases per year**
- **Congressionally mandated to adjudicate**
  - 90% within 10 months
  - 100% within 18 months
- **Adjudicated by a board of civilians of behalf of the SecAF**
  - Board consist of GS15s and SESs (collateral duty)
  - Represent most AF disciplines
  - Board is Comprised of 3-person Panels
  - Panels Consider 20 – 30 Cases Per Session
- **BCMR Staff (24 Civs/12 Mil)**
  - Arm's Length Adjudication Support
  - Case Analysis, Preparation, and Technical Advice
  - Ratify Rationale of Board Decisions
- **Request advisories from 200+ SMEs across the AF and DoD**
  - AF's chance to tell their side of the story
  - Provide expert evidence to support AF's stance

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# Preliminary Test for Board Action



■ **Step 1:** Does the relief requested involve an Air Force Record?

- Yes: Continue to step 2
- No: the Board cannot correct the record

■ **Step 2:** Is there an error in the Air Force record?

- Yes: the Board can correct the record
- No: the Board cannot correct the record (unless there is injustice; see step 3)

■ **Step 3:** Is there an injustice\* in an Air Force record?

- Yes: go on to next question
- No: the Board cannot correct the record

*\*Will discuss whether to waive statute of limitations later*

■ **Step 4:** Is there a fact/set of facts w/in the AF's jurisdiction that, if changed, would provide relief?

- Yes: the Board can correct the record
- No: the Board cannot correct the record



# Limits on Authority



## ■ Jurisdiction: Can the Board correct the record?

- Cannot correct a record in a way that would be contrary to law
  - Officer appointments
- Cannot correct a record that is beyond the authority of the Department of Air Force
  - DOD IG
  - May not reinstate ANG mbrs

## ■ Prudence: Should the Board correct the record?

- Subject matter expertise
  - Impact on mission, safety, national security
- "Zero-sum" cases
  - Robbing Peter to pay Paul
- Outcome adverse to the applicant
  - Unintended consequences
  - What's "adverse" (eye of the beholder?)



# New Requirements and Initiatives



- **FY 15 National Defense Authorization Act (NDAA)**
  - Mental Health Reviews
  - Confidential Review for Sexual Assault Victims
- **FY 16 NDAA**
  - Group Applications
- **FY 17 NDAA**
  - Training Requirements for Board Members
  - Liberal Consideration of PTSD (Combat Vets & SA Victims)
  - Posting of Statistics in Public Reading Room
  - New Reconsideration Rules
- **FY 20 NDAA**
  - Established DoD Discharge Appeal Review Board (DARB)



# Liberal Consideration and Involuntary Discharges



- **Statute-driven for BCMR (10 USC 1552) & DRB (10 USC 1553)**
  - Liberally consider information where Post-Traumatic Stress Disorder or Traumatic Brain Injury might have contributed to discharge or service characterization
  - Requires **review of medical evidence and MH provider input**
- **OSD Guidance progression: 2014 (Hagel memo), 2016 (Carson memo), 2017 (Kurta Memo) & 2018 (Wilkie Memo)**
- **Kurta memo expanded Liberal Consideration application**
  - Affirmed broad class of cases for liberal consideration
    - **If application based in whole/part on mental health condition, including PTSD; TBI; sexual assault; or sexual harassment**
    - Can apply to BCMR requests convert admin discharge to medical separation/retirement or higher disability ratings





# AFBCMR Evidence: Burden of Proof



## ■ AFI language:

- “**The applicant** has the burden of providing sufficient evidence of material error or injustice.” AFI 36-2603, paragraph 4.1
- Evidence must be sufficient to show it is **more likely than not** there was an error or injustice

## ■ Presumption of Regularity

- Applicant bears burden
- Some members want to resolve doubts **on behalf of** applicant
- It is inappropriate to grant relief to **punish** the Air Force



# Statute of Limitations: Types of Injustice to Consider



## ■ Procedural injustice: events outside the applicant's control that complicate/prevent meeting SOL

- Has to be *genuinely outside the control* of the applicant
  - USPS failed to deliver application by guaranteed date
  - Applicant was in a coma for three years
- Also has to be a *significant contributing factor* to the delay
  - USPS office closed on Sunday = probably not a factor in delay
  - Active duty service (see right)

## ■ Substantive injustice: a basis for granting the application

- If there is not enough evidence to reasonably grant the application on the merits, *then there is no injustice* in the case
- If there is no injustice, then the Board cannot waive the SOL *in the interests of justice*

The three-year statute of limitations is “tolled” during active duty, i.e., the three-year period does not start until the applicant leaves active duty (but not ANG, Reserve service)



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# Typical Equitable Principles



- **Unclean Hands/Estoppel**
- **No correction at expense of another – *Bonewell* (competing interests)**
- **Laches – unreasonable delay**
- **Substance over form**
- **Blatancy – *retirement eligibility***
- **Consistency across decisions**
- **"Injustice" – equally bad for all? (*Colton Read*)**



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# Questions?



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