

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

HUBERT EDWARD SPIRES,

Plaintiff,

v.

DEBORAH LEE JAMES,
Secretary of the Air Force,

Defendant.

Civil Action No.: _____

November 18, 2016

COMPLAINT

For nearly seventy years, the United States Air Force has denied Plaintiff H. Edward Spires the dignity of an honorable discharge because he is gay. At age 91, Mr. Spires asks the military to upgrade his discharge from “Undesirable” for reason of “homosexuality” to “Honorable,” to reflect his faithful service to his country and his equality in the eyes of the country he served. Mr. Spires is in poor health and nearly died several weeks ago while in the intensive care unit for pneumonia. Upon his death, Mr. Spires wishes to be buried with military honors, but this will be possible only with a discharge upgrade.

The Air Force discharged Mr. Spires in 1948. He was ineligible for a discharge upgrade until 2011 when the Under Secretary of Defense issued a memorandum implementing Congress’s 2010 repeal of the “Don’t Ask, Don’t Tell” statute for the purposes of discharge upgrades and record correction. Previously, that statute had prohibited gays and lesbians from serving openly in the military. Since 2011, Mr. Spires has submitted two discharge upgrade applications to the relevant Air Force board, one in 2014 and another in 2016. The Air Force denied both applications on the ground that it cannot locate his records due to a 1973 fire. In fall

2016, the Air Force apparently elected to reconsider its most recent denial, but it has not indicated by when it will complete its process.

In this action, Mr. Spires seeks judicial review of the Air Force's 2014 and 2016 decisions as arbitrary, capricious, unauthorized by law, and unreasonably delayed in violation of the Administrative Procedure Act and of his rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. He requests an order directing the Air Force to upgrade his discharge status to "Honorable," or in the alternative, to complete its review within fourteen days.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1361. This action arises under the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. § 706.

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) as Plaintiff resides in the District of Connecticut, no real property is involved in the action, and Defendant Deborah Lee James is sued in her official capacity as an officer of the United States.

PARTIES

3. Plaintiff H. Edward Spires is a veteran of the United States Air Force. He is a citizen of the United States and resides in Norwalk, Connecticut.

4. Defendant Deborah Lee James, Secretary of the Air Force, is sued here in her official capacity. Defendant has the power to act through the Air Force Board for Correction of Military Records (AFBCMR) to change any record of a former member of the Air Force when necessary to correct an error or to remove an injustice.

FACTUAL ALLEGATIONS

5. H. Edward Spires was born on November 8, 1925 in Lancaster, Ohio.

6. In 1946, at age twenty, Mr. Spires enlisted in the United States Army Air Force. He completed Basic Training at Sheppard Air Force Base in Wichita Falls, Texas.

7. After Basic Training, Mr. Spires was assigned to be a Chaplain's Assistant at Lackland Air Force Base in San Antonio, Texas. His duties included typing letters to distressed families, setting up chapels for services, playing the organ at Catholic masses, and assisting his Chaplain with communication with other members of the Chaplaincy Corps. When not busy with these obligations, Mr. Spires practiced the organ for upcoming Catholic services.

8. Mr. Spires consistently received positive performance reviews and had no disciplinary problems. In just a year and a half, he was promoted from Private to Sergeant, which requires four separate promotions.

9. In September 1947, Congress established the U.S. Air Force as a separate military service branch, independent of the U.S. Army. Mr. Spires became a member of the Air Force, although his duties and rank did not change.

10. While stationed at Lackland, Mr. Spires maintained a large circle of friends in the civilian community in San Antonio, many of whom were gay.

11. Around October 1947, Mr. Spires recalls hearing rumors that the base Commander, Colonel Hokes, called a meeting with aides to discuss "cleaning up the base of homosexuals."

12. At an off-base Halloween party in October 1947, Mr. Spires dressed as "That New Oxydol Sparkle," a reference to a then-popular advertisement for laundry detergent. Someone at the party recognized him and mistook his costume for drag.

13. Shortly after the party, a Master Sergeant brought Mr. Spires to the Judge

Advocate's office and asked Mr. Spires if he was a homosexual. Mr. Spires did not initially answer, so the Master Sergeant threatened to throw him into the stockade and tell the other prisoners that Mr. Spires was a homosexual.

14. Over the course of an hour-long interrogation, the Master Sergeant repeatedly asked Mr. Spires if he was gay and requested information about his relationships with many people in the address book that the Master Sergeant confiscated from Mr. Spires's pocket. Mr. Spires describes the event as "horrific and unbearable."

15. After an hour, the Master Sergeant offered to end the interrogation and let Mr. Spires leave if he signed a statement saying that he had passively participated in homosexual acts. Mr. Spires signed the statement in order to make the questioning stop, but refused to give names of any other gay soldiers.

16. The next week, Mr. Spires reported to the Judge Advocate's office and a Board of Inquiry. The Air Force held hearings to determine Mr. Spires's fitness for service. During the hearings, the Air Force did not offer Mr. Spires defense counsel, so he acted as his own lawyer.

17. As the base learned of Mr. Spires's upcoming court-martial, other soldiers taunted, verbally assaulted, and threatened Mr. Spires with physical violence. Only Mr. Spires's direct supervisor, Father Major John Habitz, stood up for him.

18. After the hearings, Mr. Spires's chain of command sent him to a psychiatrist who asked if he had "ever had [his] dick sucked." When Mr. Spires replied "yes," the psychiatrist indicated to Mr. Spires that he had just outed himself as a homosexual.

19. On or about March 17, 1948, the Air Force gave Mr. Spires an Undesirable discharge for reason of homosexuality. He was given a set of civilian clothes and sent home to his parents in Ohio.

20. After being discharged, Mr. Spires felt ashamed and rarely spoke to anyone about his military service. Out of fear that someone would discover the reason for his discharge, he destroyed all of his military records in his possession, including dog tags, letters, and transcripts of his court martial.

21. Mr. Spires began working at F& R Lazarus & Company, a department store in Columbus, Ohio doing interior and window display. He left Columbus in 1957 for New York City, where he worked as a display manager at one of Bloomingdales' branch stores.

22. After working at Bloomingdales for three years, he started his own decorative arts business called Fabulous Fakes, which turned out to be a success.

23. In 1970, Mr. Spires moved to Connecticut with his partner, David Rosenberg, after Mr. Rosenberg was offered a job as a high school English teacher in Greenwich.

24. He closed Fabulous Fakes after 10 years and began working with the theater department at Fairfield University. Mr. Spires enjoyed a second career in the theater, making props and scenery for community theaters across Connecticut and Ohio. He retired in 1985, at age sixty.

25. On October 2, 2005, Mr. Spires and his partner of 47 years, David Rosenberg, were united in a civil union. The ceremony was attended by a group of approximately 25 friends, including Bob Duff, current Majority Leader of the Connecticut Senate.

26. On January 8, 2009, several months after Connecticut legalized same-sex marriage, Mr. Spires married Mr. Rosenberg in their Connecticut home. John Hunt, a justice of the peace, officiated the ceremony.

27. Mr. Spires's spouse is a veteran of the United States Army. Mr. Rosenberg's command also questioned him about his sexuality, but he denied being gay and was allowed to

stay in the Army. Mr. Rosenberg received an Honorable discharge in 1956.

28. On September 23, 2014, Mr. Spires submitted an application to the AFBCMR, asking for his discharge to be upgraded to Honorable, due to the repeal of Don't Ask, Don't Tell (DADT). This application complied in full with the requirements set out in 32 U.S.C. § 865.3.

29. By letter dated October 1, 2014, the Department of the Air Force, Air Force Review Boards Agency, rejected Mr. Spires's application on the ground that his military records could not be located (copy attached as Exhibit A).

30. Mr. Spires then requested a full copy of his service records from the National Personnel Records Center (NPRC), the division of the National Archives Records Administration responsible for preserving military service records.

31. In a letter dated December 4, 2015, the NPRC replied that "[i]f the record were here on July 12, 1973 it would have been in the area that suffered the most damage in the fire on that date and may have been destroyed." The NPRC further explained that "complete records cannot be reconstructed" (copy attached as Exhibit B).

32. The July 12, 1973 fire at the NPRC "destroyed approximately 16-18 million Official Military Personnel Files (OMPF)," including records of certain Air Force personnel discharged between September 25, 1947 and January 1, 1964. *National Archives at St. Louis*, <https://www.archives.gov/st-louis/military-personnel/fie-1973.html>.

33. Despite being a subdivision of the National Archives and Records Administration, which is responsible for maintaining our nation's most important historical documents, including military personnel records, the NPRC decided against equipping their paper records storage facilities with sprinklers, smoke detectors, or firewalls. Walter W. Stender & Evans Walker, *The National Personnel Records Center Fire: A Study In Disaster*, 37 *Am. Archivist* 521 (1974). A

1975 report by the Comptroller of the United States to the House Committee on Government Operations regarding the fire suggests it was caused by “careless smoking.”

34. The NPRC also provided Mr. Spires an NA Form 13038, Certification of Military Service, to be “used for any official purpose” (copy attached as Exhibit C).

35. With the Certification of Military Service, Mr. Spires submitted another application to the AFBCMR in March 2016. On this application, Mr. Spires accidentally checked the box stating that he had been in the Marines Corps instead of the Air Force.

36. In April 2016, the AFBCMR returned Mr. Spires’s application, stating that they could not process Marines Corps applications (copy attached as Exhibit D).

37. On September 9, 2016, the AFBCMR sent Mr. Spires another letter informing him that it had assigned a docket number to his case, placed it in the Board’s case management system, and requested his records. However, the letter did not state a date by which it would complete its adjudication and cautioned that obtaining records “can be time consuming depending on the complexity of the request and the availability of the records.”

38. On October 28, 2016, in response to an inquiry by the office of Rep. Joyce Beatty, a U.S. Congresswoman from Ohio, the AFBCMR orally advised that it had rejected Mr. Spires’s second application as well.

39. Notwithstanding the AFBCMR’s April 2016 written denial and its October 2016 oral denial, on November 9, 2016, undersigned counsel spoke with AFBCMR Executive Director John Vallario, who stated that the Board was still processing the 2016 application.

40. In an email exchange between undersigned counsel and Mr. Vallario dated November 15, 2016, Mr. Vallario stated that the Board would expedite review of Mr. Spires’s case but did not state a date by which the Board would complete its adjudication.

41. By statute, the Board has eighteen months to adjudicate each application it receives. 10 U.S.C. § 1557(b).

42. Mr. Spires is ninety-one years old and in poor health. A bad case of pneumonia recently caused him to be hospitalized for three weeks and placed on a breathing tube for a week. He completed breathing therapy at the hospital before he was able to return home three weeks later. He continues to have difficulty breathing.

43. He is not entitled to a burial in a VA national military cemetery or to have military honors at his funeral due to his “Undesirable” discharge.

44. Mr. Spires does not want to pass knowing he that he will not be honored with a military burial and that the Air Force still refuses to acknowledge the sacrifices he made to serve his country with honor.

STATUTORY AND REGULATORY BACKGROUND

45. The Air Force discharged Mr. Spires on March 17, 1948. At the time, Army Regulation (AR) 615-368 (as amended May 14, 1947) governed discharge on the basis of homosexuality, because Army regulations still covered aspects of Air Force activity in 1948. *See* Joint Army and Air Force Adjustment Regulation (JAAFAR) 1-11-40 (1948).

46. Pursuant to AR 615-368, homosexuality was grounds for an Undesirable discharge, otherwise known as discharge “by reason of undesirable habits and traits of character.”

47. A veteran’s discharge status affects eligibility for various benefits and support services administered by the U.S. Department of Veterans Affairs (VA). Veterans with an “Undesirable” discharge (today known as an “Other than Honorable” discharge) are generally ineligible to receive disability, employment, housing, education, burial, and other VA benefits.

48. Congress has authorized the Secretary of the Air Force, acting through the AFBCMR, to correct the discharge of any former member of the Air Force. 10 U.S.C. § 1552.

49. An Air Force veteran may request a discharge upgrade from the AFBCMR to correct an error or injustice in his discharge characterization. 32 C.F.R. § 865.2. The application must be made within three years of the date of discharge, but the AFBCMR may waive the limitations period “in the interest of justice.” *Id.* § 865.3.

50. In the 1994 National Defense Authorization Act, Congress prohibited, for the first time, discrimination against closeted homosexual members of the Armed Services and prohibited the questioning of service members regarding their sexuality. Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1994). This policy was colloquially called “Don’t Ask, Don’t Tell” (DADT).

51. Between 1994 and 2010, federal law stated: “The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.” 10 U.S.C. § 654(a)(13) (2000).

52. In 2010, Congress passed the Don’t Ask, Don’t Tell Repeal Act, which allowed gays, lesbians, and bisexuals to serve openly in the United States Armed Forces. Pub. L. No. 111-321, 124 Stat. 3515 (2010).

53. In accordance with the Don’t Ask, Don’t Tell Repeal Act, the Under Secretary of Defense directed the Boards of Military Correction to “normally grant requests” for discharge upgrades or changes to narrative reasons for discharge “when the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct.” Memorandum dated Sept. 20, 2011, Under Secretary of Defense Clifford L. Stanley (DADT Memo) (copy attached as Exhibit E).

54. To apply for a discharge upgrade before the AFBCMR, an applicant must complete a form DD 149, which should include, at least, “(1) The name under which the member served. (2) The member’s social security number or Air Force service number. (3) The applicant’s current mailing address. (4) The specific records correction being requested. (5) Proof of proper interest if requesting correction of another person’s records. (6) The applicant’s original signature.” 32 U.S.C. § 865.3.

55. A veteran aggrieved by an agency action, including a final AFBCMR decision, may seek judicial review in U.S. District Court pursuant to the Administrative Procedure Act. 5 U.S.C. §§ 702, 706.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Administrative Procedure Act, 5 U.S.C. § 706

56. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

57. Defendant’s 2014 and 2016 denials of Mr. Spires’s applications for a discharge upgrade and change of reason for separation each constitutes final agency action.

58. Defendant’s 2014 decision ignored its own rules when it returned Mr. Spires’s application for lack of a service number.

59. Defendant denied Mr. Spires’s 2014 application on the basis that he lacked official records, despite the fact that the Department of Defense, through the NPRC, lost his records when they were destroyed in a fire.

60. Defendant’s April 2016 decision returning Mr. Spires’s application because he inadvertently marked the box for “Marines” rather than “Air Force” was arbitrary, capricious, and unauthorized by law.

61. Defendant's 2016 denial failed to consider important evidence, including the NPRC Certification of Military Service, which the NPRC stated "may be used for any official purpose."

62. Defendant and the NPRC had a duty of care to preserve Mr. Spires's military service records.

63. Mr. Spires is entitled to the benefit of an adverse inference that the records destroyed in the NPRC fire demonstrate that the ground for his undesirable discharge was "homosexuality," by operation of the spoliation of evidence doctrine.

64. The basis for Mr. Spires's discharge, AR 615-368 (as amended May 1947), is widely recognized as the regulation used to purge gay and lesbian servicemembers in the 1940s and thereafter.

65. Defendant's 2014 and 2016 denials were contrary to the DADT Memo implementing the repeal of 10 U.S.C. § 654.

66. Under the APA, a federal agency is required to act "within a reasonable time . . . to conclude a matter presented to it." 5 U.S.C. § 555(b), and Congress authorized U.S. District Courts to compel agency action that is "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

67. To the extent Defendant is still reviewing Mr. Spires's March 2016 application, it has unreasonably delayed adjudication of a matter that was first brought before it over two years ago, does not involve an overly lengthy and voluminous record, and applies to a 91 year-old veteran with failing health.

68. Defendant's decisions on Mr. Spires's 2014 and 2016 applications were arbitrary, capricious, unauthorized by law, an abuse of discretion, and unreasonably delayed, all

in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

SECOND CLAIM FOR RELIEF
Fifth Amendment to the U.S. Constitution

Violation of Procedural Due Process

69. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

70. The due process protections of the Fifth Amendment to the U.S. Constitution require that a federal administrative agency conduct adjudications in a fair and orderly manner.

71. In rejecting Mr. Spires's 2014 application, the AFBCMR failed to follow its own regulations setting forth minimum standards for discharge upgrade applications.

72. Defendant did not conduct a fair adjudication of Mr. Spires's discharge upgrade application because the AFBCMR denied his application on the basis of lack of service records, when, in fact, the Department of Defense, through the NPRC, knew his records had been destroyed in a fire.

73. The AFBCMR's policy categorically prohibiting adjudications when records are unavailable and its failure to inform veterans of alternate methods to obtain proof of service after their records were lost in the fire at the NPRC in July 1973, substantially diminishes access to adjudication for veterans whose records were affected by the fire.

74. By failing to adequately inform veterans and implement a system of case-by-case review, the AFBCMR has failed to give these veterans meaningful access to adjudications, as required by the Department of Defense's directive that "boards consider applications individually and fashion relief appropriate to the facts and circumstances of each case."

Department of Defense Directive 1332.41 § 3.2.1 (March 8, 2004).

75. Defendant's rejection of the 2016 application disregarded material evidence and

failed to recognize an adverse inference by operation of the spoliation of evidence doctrine, depriving Mr. Spires of fundamental fairness in administrative adjudications, as guaranteed by the Due Process Clause of the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- (1) Order the Defendant to upgrade Mr. Spires's discharge status to Honorable and to correct the narrative reasons for separation;
- (2) In the alternative, hold unlawful and set aside the AFBCMR's 2014 and 2016 decisions, and remand with instructions for further proceedings;
- (3) In the further alternative, order Defendant to complete its reconsideration of his 2016 application within fourteen days;
- (4) Award reasonable attorneys' fees and costs; and
- (5) Grant such other and further relief this Court deems just and proper.

Dated: November 18, 2016
New Haven, Connecticut

Respectfully Submitted,

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