

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RICHARD ROE, VICTOR VOE and
OUTSERVE-SLDN, INC.,

Plaintiffs,

v.

RICHARD V. SPENCER, in his official capacity
as Acting Secretary of Defense; MATTHEW DO-
NOVAN, in his official capacity as the Acting
Secretary of the Air Force; and the UNITED
STATES DEPARTMENT OF DEFENSE,

Defendants.

NO. 1:18-CV-01565-LMB-IDD

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION
TO COMPEL DOCUMENTS AND INFORMATION
WITHHELD ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE**

INTRODUCTION

Defendants do little more than repeat their already-rejected arguments that the “applicable level of scrutiny”—i.e., rational basis—renders the documents sought by Plaintiffs irrelevant, and that the *Cipollone* factors therefore “weigh[] heavily in favor of upholding [their] Privilege Claims.” *See* Defs.’ Br. at 8. Defendants further imply that the seniority of these officials add further weight in favor of upholding their claims. *Id.* at 1, 4, 9. But Defendants are wrong: the *Cipollone* factors weigh in favor of the production of these eight documents, as they have for nearly every document over which Defendants have asserted the deliberative process privilege in both this case and in *Harrison, et al. v. Spencer, et al.*, 18-cv-641 (E.D. Va. 2018).

ARGUMENT

I. The Eight Documents Are Absolutely Relevant to Plaintiffs’ Claims

The withheld information is not, as Defendants assert, “immaterial to Plaintiffs’ case” under any level of scrutiny. Defs.’ Br. at 8. The Court already considered and rejected this argument. *See* Pls.’ Br. at 8.

Defendants further argue that “[d]ocuments [withheld on the basis of deliberative process privilege] are not susceptible to a one-size-fits-all analysis,” and that Plaintiffs have improperly asserted that the “privilege does not apply in this case” at all, without showing that these specific eight documents are relevant. *See* Defs.’ Br. at 8. But Defendants mischaracterize Plaintiffs’ argument. As Defendants point out, “the district court ‘should consider *classes* of documents separately when appropriate,’” as opposed to *all* documents *en masse*. *Id.* (quoting *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019)). But the Court has already considered whether this class of documents—emails discussing finalized and implemented policies on Service members living with HIV—should be produced in spite of the deliberative process privilege. *Roe*, ECF No. 158, Order

Granting in Part Pls.’ Mot. to Compel; *Harrison*, ECF No. 175–76, Order and Mem. Op. Overruling in Part Sustaining in Part Defs.’ Objs. And the Court has already unequivocally stated that this class of documents is relevant and should be produced. *Id.*

Indulging Defendants’ request for a particularized analysis, however, as Defendants explain, “each of these emails predated one of the three memoranda that were issued by the Air Force concerning how airmen with asymptomatic HIV should be evaluated using the Disability Evaluation System.” Defs.’ Br. at 1–2. These memoranda are highly relevant to Plaintiffs’ claims, particularly with respect to the decision to discharge Plaintiff Voe.

The first of these Air Force memoranda is the October 11, 2017 memorandum on the Retention of Airmen with asymptomatic HIV, which states:

AFPC/DP2NP will determine if the [HIV-positive] Airman may be returned to duty with an Assignment Limitation Code (ALC-C) or *if medically necessary*, be referred to the Integrated Disability Evaluation System (IDES). *Asymptomatic HIV alone is not unfitting for continued service.* Airmen with laboratory evidence of HIV infection *and with the presence of progressive clinical illness or immunological deficiency* shall be referred into the IDES.

Ex. B to Defs.’ Br. (emphasis added).

On May 5, 2018, when this was still the policy on the treatment of Airmen with asymptomatic HIV, Victor Voe’s case was sent to the Secretary of the Air Force Personnel Counsel (“SAFPC”)—the final step in the IDES process—for final determination of whether he should be separated or returned to duty. Ex. A, First AFPB Vote Sheet, at 1. They voted “Fit, Return to Duty.” *Id.* In explaining their vote, they noted that Voe “meets criteria for retention according to the 11 Oct 2017 . . . memo,” which “states that ‘[a]symptomatic HIV alone is not unfitting for continued service.’” *Id.* at 2. In accordance with this vote, the SAFPC drafted and signed a memorandum on June 12, 2018, informing Voe of the decision to return him to duty, noting that he

should be retained because he can perform all of his in-garrison duties, his commander recommended retention, there are no special requirements for the storage or handling of his medication and because his condition does not represent a risk to others or impose unreasonable requirements on the Air Force to maintain or protect him. Ex. B, First SAFPC Memorandum. But this memorandum was never delivered to Voe. [REDACTED]

Ex. C, US00031796 at 2.

On June 6, 2018, the second memorandum, titled “Appropriate Evaluation of Fitness for Continued Service for Airmen with Asymptomatic Human Immunodeficiency Virus (HIV)” was issued. Ex. F to Defs.’ Br. This memorandum states:

Asymptomatic HIV alone is not unfitting for continued service. Airmen will not be referred into the IDES unless the criteria for referral, in accordance with DoDI 1332.18, *Disability Evaluation System*, Enclosure 3, Appendix 1, paragraph 2, are met.

Id.

[REDACTED] Ex. C, US00031446_0001 at 1

[REDACTED] Subsequently, on September 26, 2018, the Air Force issued a *third* memorandum. Ex. G to Defs.’ Br. This memorandum, unlike the previous two, states:

Airmen with Asymptomatic HIV may be retained or separated on a case by case basis in accordance with DoDI 1332.18, *Disability Evaluation System* and DoDI 6485.01, *Human Immunodeficiency Virus* . . . The phrase ‘asymptomatic HIV alone is not unfitting for continued service’ . . . is not a policy statement that asymptomatic HIV Airmen are not to be referred into DES.

Id.

Shortly thereafter, on October 18, 2018, the SAFPC reconsidered Voe's case. Ex. D., Second AFPB Vote Sheet at 1. This time, however, they found Voe unfit and voted to discharge him. *Id.* Accordingly, the SAFPC wrote, signed, and delivered to Voe a second memorandum, explaining that *even though* he was "currently asymptomatic," has maintained an undetectable viral load, "is able to perform all in garrison duties, has passed his most recent fitness assessment . . . and his commander strongly supports his retention," he is nevertheless unfit. Ex. E, Second SAFPC Memorandum, at 1.

The eight withheld emails—as Defendants point out—all surround this series of memoranda. Defs.' Br. at 6–7. The memoranda are highly relevant to the decision to separate Plaintiff Voe, as they were rescinded and issued between the first and second SAFPC votes on whether to retain or separate Voe. The Court has already stated that Plaintiffs have a right to discover "whether there is a legitimate government interest that justifies" their policies and decisions, "as well [as whether] their justification may be pretext." *Harrison*, ECF NO. 85-5, Nov. 30, 2018 Hr'g at 43:21–44:4. Each of these eight emails is therefore highly relevant to Plaintiffs' claims that the decisions to separate them (and the policies on which those decisions are based) violate equal protection because the government lacks a legitimate justification for them.

Additionally, if, as Defendants assert, the officials who authored these eight withheld documents are the "most senior military officers responsible for implementing personnel policies," Defs.' Br. at 11, this fact weighs in favor of the production of the documents. These documents contain the statements of those vested with the most power, authority, and influence over the policies. Their opinions were likely given the most weight when deciding what the Air Force's policies would be. These documents are therefore *more* important than those already produced by

Defendants, and the first *Cipollone* factor tips even further in favor of the production of these documents.

II. The Withheld Information Is Not Available From Other Sources

Defendants are wrong that the same information redacted from these eight documents is available from “other non-privileged sources to which Plaintiffs have access.” Defs.’ Br. at 9. The information Plaintiffs seek from these documents is whether Defendants’ policies were motivated by something other than the justifications they have provided for those policies. This information cannot be obtained from Defendants’ policies or their explanation of “the operation and purpose” of those policies. *Id.* at 10. Whether Defendants were motivated by something other than their stated “legitimate” interests can only be determined from their private discussions over the creation of those policies, not their publicly stated explanations.

Further, Defendants mischaracterize *Doe v. Mattis*, 917 F.3d 694 (D.D.C. 2019). *See* Defs.’ Br. at 10. The court in that case did not deny plaintiffs access to deliberative documents after applying the *Cipollone* factors. *Doe*, 917 F.3d at 705. Rather, one concurring judge merely asserted that his other concurring colleague need not “fret[] about intrusions into executive decision making” that would result from the court denying Defendants’ motion to dismiss because the court *could* “compel[] military or executive officials to explain the operation and purpose” of its policies rather than allow plaintiffs to access deliberative information. *Id.* The court did not, however, deny a motion to compel by plaintiffs. This statement is therefore nothing more than dicta.

Defendants also mischaracterize *Goldman v. Weinburg*, 475 U.S. 503 (1986). *Goldman* does not, as Defendants claim, state that “discovery is ‘quite beside the point.’” Defs.’ Br. at 10 (quoting *Goldman*, 475 U.S. at 509). Rather, it states that “whether or not *expert witnesses* may feel that religious exceptions to [a military policy against wearing yarmulkes] are desirable is quite

beside the point.” *Goldman*, 475 U.S. at 509. The court did *not* say, for example, that discovery into whether a policy prohibiting the wearing of yarmulkes was motivated by antisemitism rather than the legitimate purpose advanced by the government would similarly be “beside the point.” Plaintiffs here, like this example, seek discovery into whether Defendants’ policies were motivated by animus or the stigma associated with an HIV diagnosis. And Defendants’ emails—particularly those of the “most senior military officers responsible for implementing personnel policies” (*see* Defs.’ Br. at 11)—are the best source of this information.

III. The Disclosure of These Documents to Plaintiffs and This Court Would Not Significantly Hinder Frank and Independent Discussion

This factor does not weigh strongly against piercing the deliberative process privilege. *See* Defs.’ Br. at 11. The disclosure of the documents in this instance would be limited to Plaintiffs and the Court, and only in the context of this litigation, due to the Protective Order currently prohibiting the Parties from placing confidential documents or any of their content on the public record. *See* ECF No. 45, Protective Order. Withholding these documents simply because “senior military officials [would be] chilled from providing their candid views on future policy matters” by this limited disclosure (Defs.’ Br. at 11) would turn the deliberative process privilege, which is qualified, into an absolute privilege with respect to the deliberations of senior officials. If this were intended to be the case, a fifth “seniority” factor would have been included in the *Cipollone* test. But it was not.

IV. That The Government Plays A Role in This Litigation Tips The Scales Further In Favor of Disclosure

The Government asserts that “the role of the Government in the litigation and the seriousness of the litigation . . . does not outweigh the Government’s strong interest in non-disclosure.” Defs.’ Br. at 11, n.2. Plaintiffs disagree. The Government is the defendant in this case, and its discriminatory conduct against an entire class of individuals is at issue. Furthermore, this factor *in*

conjunction with the first and second factor, which weigh strongly in favor of piercing the privilege, together significantly outweigh any interest the Government could have under the third factor in maintaining the privilege.

CONCLUSION

For these reasons, Plaintiffs respectfully request that their Motion to Compel be granted and that the Court order the Government to produce these final eight documents being withheld on the basis of the deliberative process privilege.

Dated: July 18, 2019

/s/ Scott Schoettes

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**pro hac vice*

Respectfully submitted,

/s/ John W. H. Harding

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CERTIFICATE OF SERVICE

I certify that, on the 18th day of July, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: July 18, 2019

Respectfully submitted,

/s/ John W. H. Harding
John W.H. Harding

Name (Last, First, MI): [REDACTED]	Grade: [REDACTED]	SSAN: [REDACTED]	Type of Action: Separations/Retirement
AFSC: [REDACTED]	Duty Title: [REDACTED]		Age: [REDACTED]
Duty Location: [REDACTED]	Unit: [REDACTED]		USAF Service Status: [REDACTED]
EAD/ TAFMSD: /	ETS/DOS: /	Active Service: [REDACTED]	Satisfactory Service: [REDACTED]
Date Received: [REDACTED]	Date Considered: [REDACTED]	Analyst: [REDACTED]	
Category I Condition: HIV			
[REDACTED]	IPEB: DWSP @ 10%	FPEB: DWSP @ 10%	SAFPC: OR DVA:

Panel Findings:

Contention 1:

Options	Vote	Panel Members
1. Fit, Return to Duty (RTD) 2. Unfit, Discharged With Severance Pay (DWSP) 3. Miscellaneous (Fill in the blank)	1 [REDACTED]	Board President: [REDACTED]
	/ [REDACTED]	Panel Members: [REDACTED]
	1 [REDACTED]	[REDACTED]
	1 [REDACTED]	
	1 [REDACTED]	

MEB/IPEB/FPEB Summary:

Member is a [REDACTED] Member was found unfit by both IPEB and FPEB due to asymptomatic HIV. Member was diagnosed with HIV in [REDACTED] Member has been prescribed Tivicay (Dolutegravir) and Descoby (double therapy Emtricitabine, Tenofovir Alafenamide). Member is asymptomatic; however, his clinical history [REDACTED] member was CDC stage 2 with a CD4 count of 677/23% and a viral load of zero.

The CDC stages are: Stage I—acute HIV infection (first few weeks of disease). Stage 2 is clinical latency. Clinical latency can be prolonged with medications. Stage 3 is Acquired Immunodeficiency Syndrome (AIDS). AIDS typically occurs when the CD4 count is less than 200 cells/mm. Overt AIDS is accompanied by a variety of severe illnesses. Life expectancy for untreated AIDS is around three years.

AFPB VOTE SHEET

Page 2 of 2

Docket Number 

Member's Contention:

Member contends that he should be returned to duty.

Discussion:

Member meets criteria for retention according to the 11 Oct 2017 HQ USAF/A1P memo in the case file. Memo states that "Asymptomatic HIV alone is not unfitting for continued service."



DEPARTMENT OF THE AIR FORCE

WASHINGTON, DC

Office of the Assistant Secretary

MEMORANDUM FOR AFPC/DPFDD

FROM: SAF/MRBP

SUBJECT: Physical Evaluation - [REDACTED]

On behalf of the Secretary of the Air Force (SAF), it is directed that [REDACTED] be returned to duty.

[REDACTED] case was considered by the Air Force Personnel Board (AFPB), which made a recommendation regarding its disposition. It considered the member's contention for being returned to duty. Following a review of all facts and evidence in the case, to include the testimony presented before the Formal Physical Evaluation Board (FPEB), the remarks by the FPEB, the remarks by the Informal Physical Evaluation Board (IPEB), the service medical record (including electronic entries contained in the Armed Forces Health Longitudinal Technology Application, or AHLTA), the Narrative Summary of the Medical Evaluation Board (MEB), the Department of Veterans Affairs (DVA) medical examination, and additional information provided by the member, it is directed that he be returned to duty.

In keeping with the 6 Jun 18 SAF/MR policy memorandum, *Appropriate Evaluation of Fitness for Continued Service for Airmen with Asymptomatic Human Immunodeficiency Virus (HIV)*, and in accordance with AFI 44-178, *Human Immunodeficiency Virus Program*, the following rationale for the decision in this case is provided. [REDACTED] was diagnosed with his condition in February 2017. He has been prescribed medication that resulted in him becoming asymptomatic for HIV with an undetectable viral load. He can perform all in-garrison duties for his career field, has no fitness restrictions, and was recommended for retention by his commander. His condition does not represent a decided medical risk to his health or to the welfare or safety of others. Additionally, it does not impose unreasonable requirements on the Air Force to maintain or protect his health. Given his current health status and no requirement for medications requiring special handling, it was determined that returning him to duty constitutes a reasonable medical risk.

It is expected that the member will require an Assignment Limitation Code which may impact his ability to deploy. Additionally, if the member's condition worsens, a new MEB may be required. The member will be required to undergo an annual review in lieu of an MEB, at which time his case may be subjected to any updated policy changes.

This document contains information which must be protected IAW AFI 33-332 and DoD Regulation 5400.11; Privacy Act of 1974 as Amended Applies, and it is For Official Use Only (FOUO).

US00031011

This action is taken under the authority delegated by the Secretary of the Air Force.

6/12/2018

X

Director, SAF Personnel Council

Signed by:

From: Bradley, Achayatay N SSgt USAF SAF-MR (US)
Sent: Tuesday, July 10, 2018 8:34 AM
To: Prater, Shane T Col USAF SAF-MR (US)
Subject: RE: HOT - Please HOLD on [REDACTED]

Awesome!

Thank you Sir.

V/r

SSgt Bradley

-----Original Message-----

From: Prater, Shane T Col USAF SAF-MR (US)
Sent: Monday, July 9, 2018 5:12 PM
To: Bradley, Achayatay N SSgt USAF SAF-MR (US) <achayatay.n.bradley.mil@mail.mil>
Cc: Herrera, Christina H MSgt USAF SAF-MR (US) <christina.h.herrera.mil@mail.mil>
Subject: RE: HOT - Please HOLD on [REDACTED]

SSgt Bradley,

Yes, we are holding all HIV cases until we get more guidance from SAF/MR. This includes ones we have boarded and those we haven't.

Thanks,
-Col P

SHANE T. PRATER, Col, USAF
Director, SAF Personnel Council
Comm: (240) 612-5355; DSN: 612-5355

-----Original Message-----

From: Bradley, Achayatay N SSgt USAF SAF-MR (US)
Sent: Monday, July 09, 2018 3:32 PM
To: Prater, Shane T Col USAF SAF-MR (US) <shane.t.prater.mil@mail.mil>
Cc: Herrera, Christina H MSgt USAF SAF-MR (US) <christina.h.herrera.mil@mail.mil>
Subject: RE: HOT - Please HOLD on [REDACTED]

Sir,

Just wanted to make sure, we were still holding off on the closure of this case?
Please see email below.

Thank you.

V/r

SSgt Bradley

-----Original Message-----

From: Prater, Shane T Col USAF SAF-MR (US)

Sent: Wednesday, June 13, 2018 9:49 AM

To: Bradley, Achayatay N SSgt USAF SAF-MR (US) <achayatay.n.bradley.mil@mail.mil>

Cc: Prater, Shane T Col USAF SAF-MR (US) <shane.t.prater.mil@mail.mil>; Pinkston, Brian S Col USAF (US) <brian.s.pinkston.mil@mail.mil>

Subject: HOT - Please HOLD on [REDACTED]

SSgt Bradley,

Yesterday, I signed documents for the following case: [REDACTED] and pushed them to you in CMTARS. Have you transmitted them to APFC yet?

If not, please HOLD them for now. This is an HIV case and there is still ongoing discussion on what the AF policy is.

Please advise.

Thanks,

-Col P

SHANE T. PRATER, Col, USAF

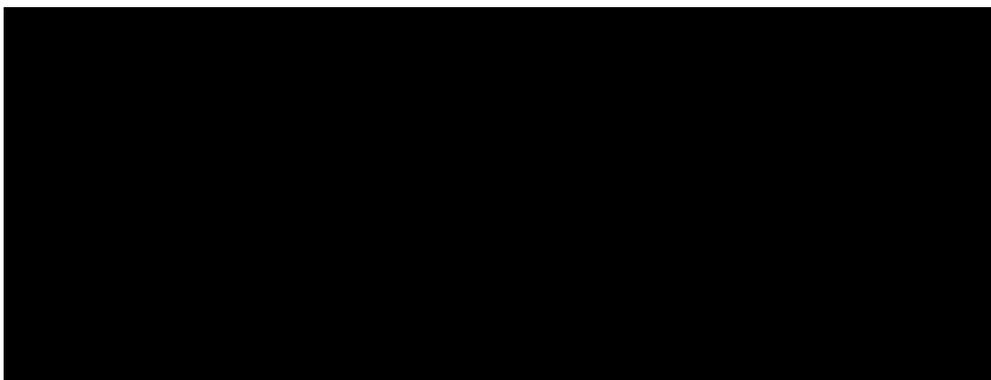
Director, SAF Personnel Council

Comm: (240) 612-5355; DSN: 612-5355

From: PALUMBO, GUY M GS-15 USAF AFPC AFPC/DPFD <guy.palumbo.1@us.af.mil>
Sent: Thursday, June 7, 2018 8:29 AM
To: Prater, Shane T Col USAF SAF-MR (US)
Subject: HIV Clarification Memo
Attachments: HIV clarification Memo.pdf

Importance: High

Shane,



Guy

GUY M. PALUMBO, GS-15, DAFC
Chief, USAF Physical Disability Division
Directorate of Airman and Family Care
Phone: (210) 565-5652; DSN: 665-5652
Email: guy.palumbo.1@us.af.mil

-----Original Message-----

From: Downes, Karen M Lt Col USAF SAF-MR (US)
[mailto:karen.m.downes2.mil@mail.mil]
Sent: Wednesday, June 6, 2018 4:51 PM
To: PALUMBO, GUY M GS-15 USAF AFPC AFPC/DPFD <guy.palumbo.1@us.af.mil>;
PRATER, SHANE T Col USAF HAF AF/AF/A1XX <shane.prater@us.af.mil>; VALLARIO,
JOHN K GS-15 USAF HAF SAF/SAF/MR <john.vallario.1@us.af.mil>; HERN, TAMMY L
CIV USAF AFPC AFPC/DPF-QA <tammy.hern@us.af.mil>; DANAHER, PATRICK J Col
USAF AFMOA AFMOA/SGHM <patrick.danaher@us.af.mil>
Cc: SOPER, MARTHA P GS-15 USAF HAF 844 CS/Pentagon
<martha.soper.1@us.af.mil>; HARP, MARY J GS-14 USAF HAF SAF/SAF/MR
<mary.harp.1@us.af.mil>
Subject: HIV Clarification Memo

ALCON,



Thank you.

V/r

Karen

//signed//

Karen M. Downes, Col, USAF

703-697-8822

IMA to Assistant Deputy, Health Policy

Office of the Secretary of the Air Force Assistant Secretary (Reserve
Affairs & Airman Readiness)

5D742

1660 Air Force Pentagon

Washington, DC 20330-1660

"Attitudes are caught not taught"

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Name (Last, First, MI):	Grade:	SSAN:	Type of Action:
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
AFSC:	Duty Title:	Age:	
[REDACTED]	[REDACTED]	[REDACTED]	
Duty Location:	Unit:	USAF Service Status:	
[REDACTED]	[REDACTED]	Regular	
EAD/ TAFMSD:	ETS/DOS:	Active Service:	Satisfactory Service:
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Date Received:	Date Considered:	Analyst:	
[REDACTED]	[REDACTED]	[REDACTED]	
Category I Condition:	HIV		
[REDACTED]	IPEB: DWSP @ 10%	FPEB: DWSP @ 10%	SAFPC:

Panel Findings:

Contention 1: Fit for Duty - RTD

Options	Vote	Panel Members
1. Fit, Return to Duty (RTD)	2 3 [REDACTED]	Board President: [REDACTED] Panel Members: [REDACTED]
2. Fit - NO	[REDACTED]	
3. Discharged With Severance Pay (DWSP) 10%	2, 3 [REDACTED]	
4. Return for Information (RFI)	[REDACTED]	
5. Return without Action (RWOA)	2, 3 [REDACTED]	
6. Miscellaneous (<i>Fill in the blank</i>)	2, 3 [REDACTED]	

MEB/IPEB/FPEB Summary:

Member is a [REDACTED] Member was found unfit by both IPEB and FPEB due to asymptomatic HIV. Member was diagnosed with HIV in [REDACTED] Member has been prescribed Tivicay (Dolutegravir) and Descoby (double therapy Emtricitabine, Tenofovir Alafenamide). Member is asymptomatic; however, his clinical history [REDACTED]

The CDC stages are: Stage I-acute HIV infection (first few weeks of disease). Stage 2 is clinical latency. Clinical latency can be prolonged with medications. Stage 3 is Acquired Immunodeficiency Syndrome (AIDS). AIDS typically occurs when the CD4 count is less than 200 cells/mm. Overt AIDS is accompanied by a variety of severe illnesses. Life expectancy for untreated AIDS is around three years.

Member's Contention:

Member contends that he should be returned to duty.

Discussion:

Member meets criteria for retention according to the 11 Oct 2017 HQ USAF/AIP memo in the case file. Memo states that "Asymptomatic HIV alone is not unfitting for continued service."

Final Disposition:



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

MEMORANDUM FOR AFPC/DPFDD

FROM: SAF/MRBP

SUBJECT: Physical Evaluation— [REDACTED]

On behalf of the Secretary of the Air Force, it is directed that [REDACTED] be discharged and receive severance pay with a disability rating of 10 percent under the provisions of Title 10, United States Code, Section 1203. This disability rating was determined based on the Veterans Affairs Schedule for Rating Disabilities (VASRD) in accordance with the National Defense Authorization Act of 2008.

[REDACTED] case was considered by the Air Force Personnel Board (AFPB), which made a recommendation regarding its disposition. The following rationale is provided for the final decision in this case. The Board considered the member's contention that he is fit and should be returned to duty. The Board noted the member has been compliant with all treatment, is currently asymptomatic, and has an undetectable human immunodeficiency virus (HIV) viral load. Additionally, he is able to perform all in garrison duties, has passed his most recent fitness assessment without any component exemptions, and his commander strongly supports his retention. However, the Board noted the member's condition precludes him from being able to deploy world-wide without a waiver and renders him ineligible for deployment to the Central Command (CENTCOM) Area of Responsibility (AOR), where the majority of Air Force members are expected to deploy. Deployability is a key factor in determining fitness for duty and the Board recognized the member belongs to a career field with a comparatively high deployment rate/tempo. Therefore, based on his inability to deploy and considering his current career point, the Board determined he is unfit for continued military service and shall be discharged with severance pay.

Addressing the applicant's disability rating award, the Board is required by law to rate a disability using criteria outlined in the VASRD. The AFPB typically applies the disability ratings proposed by the Department of Veterans Affairs (DVA) under the Integrated Disability Evaluation System (IDES), as these ratings should be in compliance with the VASRD. The Board therefore assigned a rating of 10 percent to the member's HIV infection. This rating warranted discharge with severance pay.

This document contains information which must be protected IAW AFI 33-332 and DoD Regulation 5400.11; Privacy Act of 1974 as Amended Applies, and it is For Official Use Only (FOUO).

US00030631

This action is taken under the authority delegated by the Secretary of the Air Force.

11/7/2018

X

[REDACTED]
[REDACTED]
Deputy Director, SAF Personnel Council
[REDACTED]

Attachment:
Additional Information Sheet

Additional Information Sheet

Your case was reviewed by the Air Force Personnel Board (AFPB) of the Secretary of the Air Force Personnel Council (SAFPC) under authority delegated by the Secretary of the Air Force. The board reviewed all facts and evidence in the case, to include the testimony presented before the Formal Physical Evaluation Board (FPEB) and the remarks of the FPEB (if applicable), the remarks of the Informal Physical Evaluation Board (IPEB), the service medical record (including electronic entries contained in the Armed Forces Health Longitudinal Technology Application, or AHLTA), the Narrative Summary of the Medical Evaluation Board (MEB), the Department of Veterans Affairs (DVA) medical examination, information provided by you and your counsel, and any additional information that was provided.

If you are on extended active duty and have between 15 and 19+ years of active duty service (but less than 20 years), have an essentially stable condition, and wish to return to duty, you **may** be eligible to apply for the Limited Assignment Status (LAS) program. Please see Chapter 6 of AFI 36-3212 for more information or discuss your options with your Office of Airmen's Counsel (OAC) representative. Note: you are normally **not** eligible to apply for LAS if you are being placed on the Temporary Disability Retired List (TDRL).

The board is sensitive to your potential need for continuing medical care. Therefore, the board encourages you to utilize the resources of the DVA to the extent that you may be entitled. The DVA is the agency chartered by Congress to provide assistance to all eligible veterans. A full complement of medical services is available at any tertiary-level DVA health care facility. The DVA's Vocational Rehabilitation and Employment Program's mission is to assist veterans with a service-connected disability to prepare for and find suitable employment. Additional information regarding this program can be obtained at the following website: <http://www.benefits.va.gov/vocrehab/index.asp>. The Military Disability Evaluation System (MDES) is responsible for maintaining a fit and vital fighting force. While the MDES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting their disability ratings should their degree of impairment vary over time.

You are also advised of your right to pursue further appeal through application to the Air Force Board for Correction of Military Records (AFBCMR) should you find reason that brings into question the decision of the board. The AFBCMR is an independent body chartered by Congress to redress any Air Force personnel action without influence of previous boards or their respective decisions. You may obtain information on appeal procedures from the AFBCMR website at: <http://www.afpc.af.mil/Board-for-Correction-of-Military-Records>.