

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2023

DOCKET NUMBER: AR20230005551

APPLICANT AND HIS COUNSEL REQUEST: through counsel, a video/telephone appearance before the board and changes to her DD Form 214 (Certificate of Release or Discharge from Active Duty) to show:

- the narrative reason for separation and respective separation code to reflect “Secretarial Authority”
- the separation authority to reflect Army Regulation (AR) 635-200, Chapter 5, Section II
- the reentry code as 1

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief of Counsel (15 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant requests correction of the errors and injustices associated with the narrative reason for separation, separation code, and reentry code initially identified on her DD Form 214. She requests the amendment to the DD Form 214 reflect “Secretarial Authority,” with respective separation code and a reentry code of 1. Her discharge was the result of post-traumatic stress disorder (PTSD) and/or sexual assault/harassment at the hands of other Soldiers. It was insanity that led to her attempt to commit suicide rather than be discharged under “Don’t Ask Don’t Tell” (DADT). She was taken to the hospital in Bamberg, Germany to have her stomach pumped. The discharge characterization is in error and unjust due to the repeal of DADT. The applicant defers to counsel’s brief for additional information, the full petition is available for review by the Board, and states in part:

a. The applicant was discharged from the United States Army pursuant to the law commonly known as DADT, after serving for fourteen months as a member of the Regular Army, attaining the rank of Private First Class (PFC), and being granted numerous commendations for her performance and conduct. She received a Certificate DD Form 214 that characterized her service as "Honorable" and listed the narrative reason for her separation as "Homosexual Act," her separation code as JRA, and her reenlistment code as "4."

b. Since the applicant's discharge, the government has changed its policy regarding homosexuality in the Armed Forces. Through the repeal of DADT on 20 September 2011, it has acknowledged that a Soldier's sexual orientation has no bearing on a Soldier's fitness for military service and that homosexual conduct no longer constitutes valid grounds for discharge. In light of this shift in military policy, and in order to avoid continuing injustice, the Army Board for Correction of Military Records (the "Board") should:

- change narrative reason for discharge from "Homosexual Act" to "Secretarial Authority,"
- change the separation code from JRA to JFF
- change the separation authority to AR 635-200, Chapter 5, Section II ("Secretarial Authority")
- change reentry code from "4" to "1" (immediately eligible to reenter)

3. The applicant and counsel provide a DD Form 149 signed on 16 September 2017. A thorough review of prior cases did not reveal the applicant had an associated case or that this is a reconsideration. The applicant and counsel also indicated post-traumatic stress disorder (PTSD), other mental health, sexual assault/harassment, "Don't Ask Don't Tell," and transgender were issues/conditions related to the request.

4. A review of the applicant's service record shows:

a. The applicant enlisted in the Regular Army on 11 July 2000.

b. The DA Form 2-1 (Personnel Qualification Record) reflects foreign service in Germany from 23 January 2001 through the applicant's discharge date on 11 September 2001.

c. On 1 March 2001 the applicant underwent a mental status evaluation. The physician noted in the findings, the applicant was diagnosed with an acute psychiatric condition for which medication was appropriate. The applicant was not seen as a danger for self-harm or harm to others. He further noted as a "precaution," to counsel peers to refrain from mocking and harassing the individual. The evaluation further indicated:

- normal behavior and moderately depressed
- normal thought content and denied suicidal ideations
- normal concentration and normal energy level
- psychiatrically cleared for administrative action deemed appropriate

d. The applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Enlisted Personnel – Personnel Separations), Chapter 15 for homosexual conduct. The specific reasons for his proposed recommendation were based upon the applicant engaging in homosexual conduct. The applicant acknowledged receipt on 30 August 2001.

e. On 30 August 2001, after declining consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights he may encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he elected not to submit matters

f. On 30 August 2001, the immediate commander initiated separation action against the applicant for homosexual conduct. He recommended that his period of service be characterized as honorable.

g. On 4 September 2001, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 15, for homosexual conduct. He would be issued an honorable discharge.

h. Orders 248-003, dated 5 September 2001, discharged the applicant from active duty with an effective date of 11 September 2001.

i. On 11 September 2001, he was honorably discharged from active duty. Her DD Form 214 shows he completed 1 year, 2 months, and 1 day of active service with no lost time. It also shows:

- Item 25 (Separation Authority) – AR 635-200, paragraph 15-3a
- Item 26 (Separation Code) – JRA
- Item 27 (Reentry Code) – 4
- Item 28 (Narrative Reason for Separation) – Homosexual Act

5. There is no evidence the applicant has applied to the Army Discharge Review Board for review of her discharge within that board's 15-year statute of limitations.

6. Under Secretary of Defense (Personnel and Readiness) memorandum states that, effective 20 September 2011, it is DOD policy that broad, retroactive corrections of records from applicants discharged under DADT (or prior policies) are not warranted. Although DADT is repealed effective 20 September 2011, it was the law and reflected the view of Congress during the period it was the law. Similarly, DOD regulations implementing various aspects of DADT (or prior policies) were valid regulations during those same or prior periods. Thus, the issuance of a discharge under DADT [or prior policies] should not by itself be considered to constitute an error or injustice that would invalidate an otherwise properly taken discharge action. An upgrade, if and when warranted, would entail a change to:

- narrative reason for discharge (to "Secretarial Authority" with the Separation Code of JFF)
- characterization of service to honorable
- the RE code to an immediately-eligible-to-reenter category

7. For the above upgrades to be warranted, the memorandum states both of the following conditions must have been met:

- the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT
- there were no aggravating factors in the record, such as misconduct

8. The memorandum further states that although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

9. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

10. By regulation (AR 635-200), in effect at the time, prescribed the criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. When the sole basis for separation was homosexuality, a discharge under other than honorable conditions could be issued only if such characterization was otherwise warranted.

11. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

12. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting the narrative reason for separation and respective separation code to reflect "Secretarial Authority", the separation authority to reflect Army Regulation (AR) 635-200, Chapter 5, Section II, and the reentry code as 1. She contends her discharge was the result of PTSD, "Don't Ask Don't Tell" (DADT), and sexual assault/harassment. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted into the Regular Army on 11 July 2000; 2) On 11 September 2001, she was honorably discharged from active duty, Chapter 15-13a-Homosexual Act.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The VA's Joint Legacy Viewer (JLV) was also reviewed. The applicant states she was wrongly discharged under the policy of DADT, and she experienced PTSD and sexual assault/harassment while on active service, which impacted her discharge. She did not directly report experiencing a military sexual assault while on active service in her narrative description, but she did describe experiencing harassment. There is evidence the applicant was seen for behavioral health treatment in Wuerzburg, Germany. She was identified as being moderately depressed but denied suicidal or homicidal ideation. She was diagnosed with Dysthymic Disorder and prescribed antidepressant medication and psychotherapy. It was also recommended her status be checked daily and her peers refrain from "mocking and harassing" her. Despite the diagnosis of Dysthymic Disorder, the applicant was found to meet retention standards, and there was no psychiatric disease that warrants disposition through medical channels. The current diagnosis was identified as an acute psychiatric condition, and the applicant with treatment should be able to perform regular duties. There was no other medical documentation provided where the applicant was diagnosed with PTSD.

c. A review of JLV was void of any medical information, and the applicant does not receive any service-connected disability. Based on the available information, it is the opinion of the Agency BH Advisor the applicant was discharged for homosexual behavior under DADT. There is sufficient evidence that she also experienced harassment based on her sexual orientation as she contends. There is insufficient

evidence beyond self-report the applicant was also experiencing PTSD during her active service, which impacted her discharge. However, she was diagnosed with other mental health conditions such as depression or Dysthymia likely as a result of the harassment she experienced and the negative consequences of DADT policies.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was discharged for homosexual behavior under DADT. There is sufficient evidence that she also experienced harassment based on her sexual orientation as she contends. There is insufficient evidence beyond self-report the applicant was also experiencing PTSD during her active service, which impacted her discharge. However, she was diagnosed with other mental health conditions such as depression or Dysthymia likely as a result of the harassment she experienced and the negative consequences of DADT policies.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was discharged for homosexual behavior under DADT. There is sufficient evidence that she also experienced harassment based on her sexual orientation as she contends. There is insufficient evidence beyond self-report the applicant was also experiencing PTSD during her active service, which impacted her discharge. However, she was diagnosed with other mental health conditions such as depression or Dysthymia likely as a result of the harassment she experienced and the negative consequences of DADT policies.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, the applicant was discharged for homosexual behavior under DADT. There is sufficient evidence that she also experienced harassment based on her sexual orientation as she contends. There is insufficient evidence beyond self-report the applicant was also experiencing PTSD during her active service, which impacted her discharge. However, she was diagnosed with other mental health conditions such as depression or Dysthymia likely as a result of the harassment she experienced and the negative consequences of DADT policies. Therefore, it is recommended that her discharge be updated accordingly.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the

Board determined that relief was warranted. The applicant was discharged from active duty on 11 September 2001, with 1 year, 2 months, and 1 day of active service. She was discharged under AR 635-200, chapter 15, due to homosexual acts and assigned Separation Code JRA and RE Code 4. The Board determined that since the applicant was discharged based solely on DADT (or a similar policy in place prior to enactment of DADT) and since there were no aggravating factors in the record, such as misconduct, based upon a change in DoD policy relating to homosexual conduct, the Board concluded that making the changes to the applicant's DD Form 214 was appropriate.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by issuing the applicant a new DD Form 214 for the period ending 11 September 2001 showing in:

- item 24 (Characterization of Service): Honorable
- item 25 (Separation Authority): AR 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Army Regulation 635-200 (Enlisted Personnel – Personnel Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met, the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 15, in effect at the time, prescribed the criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. Homosexuality is grounds for separation when a Soldier has engaged in, attempted to engage in, or solicited another person to engage in a homosexual act. When the sole basis for separation is homosexual conduct, a discharge under other honorable conditions may be issued only if such characterization is warranted.



4. Army Regulation 635-5 (Separation Documents), in effect at the time, states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) states SPD codes are three-character alphabetic combinations which identify reasons for and types of separation from active service. Table 2-3 identifies SPD code of "JRA" with a narrative reason for separation of "Homosexual Conduct (Acts)," under regulatory authority AR 635-200, paragraph 15-3a.

6. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the RA and the United States Army Reserve. Table 3-1 included a list of the RE codes. RE codes are numbered 1, 3, and 4.

- RE-1 applies to Soldiers completing their term of active service who are considered qualified to reenter the U.S. Army; they are qualified for enlistment if all other criteria are met
- RE-3 applies to Soldiers who are not considered fully qualified for reentry or continuous service at the time of separation, but the disqualification is waivable; those individuals are ineligible unless a waiver is granted
- RE-4 applies to Soldiers ineligible for reentry

7. DADT policy was implemented in 1993 during the Clinton presidency. This policy banned the military from investigating service members about their sexual orientation. Under that policy, service members may be investigated and administratively discharged if they made a statement that they were lesbian, gay, or bisexual; engaged in physical contact with someone of the same sex for the purposes of sexual gratification; or married, or attempted to marry, someone of the same sex.

8. Under Secretary of Defense (Personnel and Readiness) memorandum, dated 20 September 2011, subject: Correction of Military Records Following Repeal of Section 654 of Title 10, U.S. Code, provides policy guidance for Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to follow when taking action on applications from former service members discharged under DADT or prior policies. The memorandum states that, effective 20 September 2011, Service DRBs should normally grant requests, in these cases, to change the:

- narrative reason for discharge (to "Secretarial Authority" with the SPD code of JFF)
- characterization of service to honorable
- the RE code to an immediately-eligible-to-reenter category

9. For the above upgrades to be warranted, the memorandum states both of the following conditions must have been met: the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and there were no aggravating factors in the record, such as misconduct. The memorandum further states that although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

10. The memorandum also recognized that although BCM/NRs have a significantly broader scope of review and are authorized to provide much more comprehensive remedies than are available from the DRBs, it is Department of Defense (DOD) policy that broad, retroactive corrections of records from applicants discharged under DADT [or prior policies] are not warranted. Although DADT is repealed effective 20 September 2011, it was the law and reflected the view of Congress during the period it was the law. Similarly, DOD regulations implementing various aspects of DADT [or prior policies] were valid regulations during those same or prior periods. Thus, the issuance of a discharge under DADT [or prior policies] should not by itself be considered to constitute an error or injustice that would invalidate an otherwise properly taken discharge action.

11. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not

result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

12. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//