

IN THE CASE OF: ██████████

BOARD DATE: 11 January 2024

DOCKET NUMBER: AR20230006512

APPLICANT REQUESTS: upgrade of the former service member's (FSM) undesirable discharge to honorable based on "Don't Ask, Don't Tell" (DADT).

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- Durable Power of Attorney

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, the nephew of the FSM, states the FSM is currently in a Memory Care Unit due to onset of dementia. The applicant would like to be able to tell the FSM of the change of discharge. Currently the undesirable reason for discharge is Army Regulation (AR) 635-89 (Personnel Separations-Homosexuals), with Separation Program Number (SPN) 257, but based on the repeal of "DADT" in 2011, this discharge should be changed to honorable. The FSM is 79 years old; and the applicant would like this corrected before the FSM passes away.
3. The FSM was inducted into the Army of the United States on 18 November 1963 for two years. His military occupational specialty was 74B (Card and Tape Writer).
4. A Sworn Statement from the FSM, to Criminal Investigator ██████████ dated 8 July 1965, shows ██████████ was conducting an investigation of homosexuality. In his statement the FSM states he had engaged in homosexual acts prior to his military service, and he had never had homosexual acts with service men, that he knows of. It is an unhappy life because of the looks that you have to bear from people and hearing people talk about the gay people and knowing that he is one of them.

5. An updated statement, dated 12 July 1965, shows the FSM revised his statement and stated that he had homosexual relations with two military personnel who were stationed on his post, but he was afraid to tell ██████ for fear they might hear of it and do the FSM harm. He could see that eventually this information would come out anyway so he might as well get it off his chest once and for all.

6. A Clinical Record, Consultation Sheet, dated 12 July 1965, shows the FSM was diagnosed with homosexuality, manifested by admitted overtly homosexual practices. Predisposition: moderate (speech defect with associated rejection by his father and over protection by his mother). Stress: Minimal, routine military service. It was recommended that the FSM be administratively separated from the service under the provisions of AR 635-89. Line of Duty (LOD): No, not due to own misconduct.

7. The Report of Medical Evaluation, dated 29 July 1965, reiterates the above and shows this condition is a pathological personality type representing a borderline adjustment state due to deficiencies in emotional and personality development of such a degree as to render this patient unsuitable for further military service.

a. The FSM had no physical or mental disability sufficient to warrant separation under the provisions of AR 635-40 (Personnel Separations-Physical Evaluation for Retention, Separation or Retirement for Physical Disability).

b. He was and is mentally responsible both to distinguish right from wrong and to adhere to the right and had the mental capacity to understand and participate in the board proceedings.

8. The FSM's commander recommended separation from service on 10 August 1965, in accordance with AR 635-89.

9. The FSM consulted with counsel on 10 August 1965 and was advised of the basis for the action, under AR 635-89, being taken against him. He acknowledged receipt of the proposed separation memorandum. He waived counsel and he waived a hearing of his case by a board of officers. He accepted discharge for the good of the service.

a. He further understood that his separation from the Army may be other than honorable; that as a result of such discharge he may be deprived of many rights and benefits as a veteran both under Federal and State Laws and that he may expect to encounter substantial prejudice in civilian life in situations where the type and serve rendered in any branch of the Army Forces or the character of discharge received therefrom may have a bearing.

b. He elected not to submit statements in his own behalf.

10. His chain of command recommended approval and that an Undesirable Discharge Certificate be furnished.

11. On 18 August 1965, the staff judge advocate noted the provisions of AR 635-89 appeared to have been complied with.

12. The separation authority approved the recommended separation action on 1 September 1965, under the provisions of AR 635-89, and directed the issuance of a DD Form 258A (Undesirable Discharge Certificate). He further directed the FSM be immediately reduced to the lowest enlisted grade.

13. The FSM was discharged on 3 September 1965. His DD Form 214 shows he was discharged under the provisions of AR 635-89, with SPN 257 [Unfitness, Homosexual acts]. His service was characterized as undesirable. He was credited with 1 year, 9 months, and 16 days of net active service.

14. The applicant provides a copy of the FSM's DD Form 214 and a durable power of attorney.

15. The DADT policy was implemented in 1993. This policy banned the military from investigating service members regarding their sexual orientation. Under the previous policy, service members may have been 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.

16. The DADT Repeal Act of 2010 was a landmark U.S. federal statute enacted in December 2010 that established a process for ending the DADT policy, thus allowing gays, lesbians, and bisexuals to serve openly in the U.S. Armed Forces. It ended the policy in place since 1993 that allowed them to serve only if they kept their sexual orientation secret and the military did not learn of their sexual orientation.

17. The Under Secretary of Defense for Personnel and Readiness memorandum, dated 20 September 2011 [Stanley Memorandum], subject: Correction of Military Records Following Repeal of Section 654 of Title 10, USC, provides policy guidance for Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to follow when taking action on applications from former service members discharged under DADT or prior policies.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted.

2. The Board found no evidence that would prevent correction of the FSM's record in accordance with the guidance received from the Under Secretary of Defense for Personnel and Readiness on 20 September 2011. Based on a preponderance of the evidence, the Board determined the FSM's character of service should be changed to honorable and the reason for his separation should be changed to Secretarial authority.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

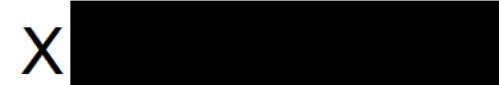
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|---|---|---|----------------------|
| ■ | ■ | ■ | GRANT FULL RELIEF |
| : | : | : | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| : | : | : | DENY APPLICATION |

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 reissuing his DD Form 214 to show the following entries:

- Character of service – Honorable
- Separation authority – AR 635-200
- Narrative reason for separation – Secretarial authority
- Separation code – JFF
- Reentry code – 1

4/1/2024



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CHAIRPERSON



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, USC, 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. AR 635-89, in effect at the time, prescribed the criteria and procedures for the separation of homosexual personnel from the Army.
 - a. Homosexual personnel, irrespective of sex, were not permitted to serve in the Army in any capacity. Prompt separation was mandatory. The regulation defined three classes of homosexuality:
 - class I-involving an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate or consent

- class II-cases in which homosexual military personnel have engaged in one or more homosexual acts not within the purview of class I
- class III-consists of homosexual individuals who have not engaged in homosexual acts while in active military service

b. When investigation clearly indicated an individual was a class II homosexual, he/she was be afforded the opportunity to accept a discharge. If not accepted, the commander was to forward the case to the general court-martial convening authority for action. Action could include retention, appropriate action under the Uniform Code of Military Justice, or separation.

c. The separation approval authority determined the character of service, but honorable or general discharges were normally only awarded in cases where the Soldier had disclosed his/her homosexual tendencies when entering the service, if the Soldier served over an extended period of time, or if he/she performed in an outstanding or heroic manner. Upon discharge determination, the Soldier was reduced to private/E-1.

3. AR 635-200 (Personnel Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Paragraph 5–3 (Secretarial plenary authority) provides that:

a. Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

b. Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers. When used in the latter circumstance, it is announced by special Headquarter, Department of the Army directive that may, if appropriate, delegate blanket separation authority to field commanders for the class category of Soldiers concerned.

4. The DADT policy was implemented in 1993. This policy banned the military from investigating service members regarding their sexual orientation. Under the previous policy, service members may have been 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.

5. The DADT Repeal Act of 2010 (Title 10, USC, Section 654) was a landmark U.S. federal statute enacted in December 2010 that established a process for ending the DADT policy, thus allowing gays, lesbians, and bisexuals to serve openly in the U.S. Armed Forces. It ended the policy in place since 1993 that allowed them to serve only if they kept their sexual orientation secret and the military did not learn of their sexual orientation.

6. Under Secretary of Defense for Personnel and Readiness memorandum, dated 20 September 2011, subject: Correction of Military Records Following Repeal of Section 654 of Title 10, USC, provides policy guidance for Service DRBs and Service BCM/NRs to follow when taking action on applications from former service members discharged under DADT or prior policies.

a. This memorandum provided that effective 20 September 2011, Service DRBs and BCM/NRs should normally grant requests in these cases to change the following:

- item 24 to "Honorable"
- item 25 to "Army Regulation 635-200, paragraph 5-3"
- item 26 to "JFF"
- item 27 to "1"
- item 28 to "Secretarial Authority"

b. 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

c. 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.

d. 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 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, Department of Defense regulations implementing various aspects of DADT [or prior policies] were valid regulations during that 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.

e. It further directed that the DD Form 214 be reissued in lieu of the DD Form 215 (Correction of the DD Form 214), to avoid a continued record of the homosexual separation.

//NOTHING FOLLOWS//