

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 February 2024

DOCKET NUMBER: AR20230006676

APPLICANT REQUESTS:

- upgrade his characterization of discharge to honorable
- change the narrative reason of separation to secretarial authority
- change his reentry (RE) code to RE-1
- do not include any remarks on his new DD Form 214 (Certificate of Release or Discharge from Active Duty) that shows it is a corrected copy

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214

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 states, in effect, his discharge is unjust because the sole reason for it was homosexual admission. There were no aggravating factors alleged in his discharge paperwork. Further, his record reflects high marks. He has therefore met the requirements that the sole reason for his discharge was due to his homosexual admission. He recently learned he could request changes to his DD Form 214 for don't ask don't tell (DADT).
3. The applicant's service record contains the following documents:
 - a. A DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States), dated 28 January 2005, shows the applicant enlisted in the U.S. Army Reserve (USAR) delayed entry program (DEP) for a period of 8 years. On 3 February 2005, he was discharged from the USAR DEP and entered active duty for a period of 3 years and 16 weeks.

b. An undated memorandum, subject: Discharge Under the Provisions of Chapter 15, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) for Homosexual Conduct, notified the applicant his commander was recommending him for discharge for homosexual conduct. The commander was recommending the applicant receive an entry-level status separation-uncharacterized discharge. The applicant stated to his chain of command that he was homosexual.

c. An undated memorandum election of rights, wherein the applicant stated he had been advised by his consulting counsel of the basis of the recommendation to separate him for homosexual conduct and waived consulting counsel.

d. An undated memorandum shows the applicant's chain of command recommended he be separated from the Army with an issuance of an entry-level status separation - uncharacterized. On 21 March 2005, the appropriate approval authority directed the applicant be discharged from the Army with an entry level - uncharacterized discharge.

e. A DD Form 214 shows the applicant entered active duty on 3 February 2005 and was discharged on 24 March 2005. He had completed 1 month and 22 days of active duty service. He was discharged for homosexual admission and his service was uncharacterized. His separation code was JRB and his RE Code was 4.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board determined partial relief is warranted.
2. With one exception, the Board found no evidence that would preclude the relief recommended in the Under Secretary of Defense (Personnel and Readiness) memorandum, dated 20 September 2011, regarding the repeal of DADT. The Board determined the applicant's DD Form 214 should be reissued to show the reason for his discharge was Secretarial authority with separation code JFF and reentry code 1.
3. The Board noted the applicant was in an entry-level status when he was discharged. Because of this status, his service was uncharacterized in accordance with the governing regulation. The Board found no extraordinary factors that would have warranted assigning him a character of service. The Board determined his uncharacterized service was not in error or unjust.

4. The Board found no evidence in this case that would support an exception to the regulatory requirement to include a statement on the DD Form 214 indicating it was administratively reissued.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
█	█	█	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION


BOARD DETERMINATION/RECOMMENDATION:


1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial 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:

- Block 25 – AR 635-200
- Block 26 – JFF
- Block 27 – 1
- Block 28 – Secretarial authority

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

5/6/2024

X 

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, 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. AR 635-200 (Personnel Separations), in effect at the time, set policies, standards, and procedures for the separation of enlisted personnel. Chapter 15 (Discharge for Homosexual Conduct) provided homosexual conduct was grounds for separation from the Army under the criteria set forth in paragraph 15-3. This includes pre-service, prior service, or current service homosexual conduct.

a. Paragraph 15-3 provides a Soldier will be discharged if one or more of the following findings have been made and are approved by the separation authority: if he or she engaged in, attempted to engage in, or solicited another person to engage in a homosexual act or acts; made a statement that he or she is a homosexual or bisexual, or married or attempted to marry a person known to be of the same biological sex.

b. An honorable or general under honorable characterization is appropriate unless an under other than honorable conditions discharge is warranted and there is a finding that during the current term of service the Soldier attempted, solicited, or committed a homosexual act:

- by using force, coercion, or intimidation with a person under 16 years of age
- with a subordinate in circumstances that violate customary military superior-subordinate relationships
- openly in public view
- for compensation aboard a military vessel or aircraft in another location subject to military control under aggravating conditions noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

c. Soldiers separated if in an entry level status (i.e. the first 180 days of continuous active duty) would receive an uncharacterized discharge. If the Soldier was in an entry level status, at the time of discharge, the DD Form 214 could describe her service as uncharacterized. The Secretary of the Army could, on a case-by-case basis, authorize the issuance of an honorable character of service, when such action was clearly warranted by unusual circumstances involving personal conduct or duty performance.

3. The DADT policy was implemented in 1993 during the Clinton administration. 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.

4. 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 (the change should be to "Secretarial Authority")
- SPD Code JFF
- characterization of the discharge to honorable
- RE code to an immediately-eligible-to-reenter category

5. 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.

6. 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.

7. 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 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.

8. Army Regulation 635-8 (Separation Processing and Documents) states when a DD Form 214 is administratively reissued, enter that fact and the date of such action on the

DD Form 214, block 18 (Remarks), unless the authority directing reissuance specifies otherwise.

//NOTHING FOLLOWS//