

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 February 2024

DOCKET NUMBER: AR20230007473

APPLICANT REQUESTS: his narrative reason for separation be changed from homosexuality to something more favorable, or entirely removed. He also requests an appearance before the Board via video/telephone.

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

DD Form 149 (Application for Correction of Military Record), 30 March 2023

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 states, in effect, he was the victim of sexual assault and racial harassment while in the Army. He has not received help from the Army regarding this, and has had multiple mental health treatments and a suicide attempt. He is requesting a reevaluation of his case to receive Department of Veterans Affairs (VA) services and other government benefits and is requesting a non-discriminatory narrative reason for separation. He notes post-traumatic stress disorder (PTSD), other mental health, and sexual assault/harassment are related to his request.
3. The applicant enlisted in the Regular Army on 24 November 1992, for a period of 4 years. He was awarded the military occupational specialty of 52D (Power Generator Equipment Repairer).
4. The applicant was notified on 11 June 1993 of his immediate commander's intent to initiate separation actions against him under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), Chapter 15, for admission of homosexuality. As the specific reasons his commander cited, on several occasions the applicant admitted that he is a homosexual.

5. The applicant acknowledged receipt of the proposed separation notification on 11 June 1993. He consulted with legal counsel and was advised of the basis for the contemplated separation action and its effects, the rights available to him, and the effects of a waiver of his rights. He elected to waive consideration, a personal appearance, and representation by counsel before an administrative board. He further acknowledged he may encounter substantial prejudice in his civilian life.

6. The applicant's immediate commander formally recommended the applicant's separation from service on 24 June 1993, under the provisions of Army Regulation 635-200, Chapter 15, by reason of homosexuality. The commander further recommended the applicant receive an honorable discharge.

7. On 25 June 1993, the staff judge advocate, reviewed the case pertaining to the applicant and deemed the discharge appropriate and legally sufficient

8. The applicant's intermediate commanders concurred with the recommended action for separation under AR 635-200, Chapter 15.

9. The separation authority approved the recommended separation action on 28 June 1993 and directed the issuance of an honorable discharge.

10. The applicant was discharged on 2 July 1993. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 7 months and 9 days of net active service and contains the following entries:

- item 24 (Character of Service) – Honorable
- item 25 (Separation Authority) – Army Regulation 635-200, Paragraph 15-3b
- item 26 (Separation Code) – JRB
- item 27 (Reentry Code) – RE-3
- item 28 (Narrative Reason for Separation) – Admission of Homosexuality/Bisexuality

11. The Don't Ask Don't Tell (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.

12. 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.

13. The 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 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.

14. The Board should consider the applicant's evidence, argument, and overall record in accordance with the published equity, injustice, or clemency determination guidance.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting his narrative reason for separation be changed. He contends he experienced military sexual trauma (MST), racial discrimination and resultant mental health conditions including PTSD that mitigated his discharge.

b. 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 in the Regular Army on 24 November 1992; 2) The applicant was honorably discharged on 2 July 1993, Chapter 15, Admission of Homosexuality/Bisexuality.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. The applicant reported he experienced MST, racial discrimination and resultant mental health conditions including PTSD during his active service. There is insufficient evidence the applicant reported harassment, MST, or any mental health conditions, including PTSD while on active service. A review of JLV has provided evidence the applicant has been actively involved in the VA for assistance with homelessness and physical and mental health concerns. He does not receive any service-connected disability for a service-connected mental health disorder including PTSD. However, he has been in behavioral health care consistently for depression and PTSD related to his report of MST since 2022.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that mitigated his discharge.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reports experiencing MST, racial discrimination and resultant mental health conditions including PTSD during his active service. The applicant was diagnosed and provided treatment for Depression and PTSD as the result of his report of MST by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing MST, racial discrimination and resultant mental health conditions including PTSD during his active service. The applicant was diagnosed and provided treatment for Depression and PTSD as the result of his report of MST by the VA.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant was exposed to MST and experienced resultant behavioral health symptoms while on active service. Later, he was diagnosed with PTSD and Depression as the result of MST. It is reasonable to surmise that the applicant would have completed his initial commitment to the Army if not exposed to MST. Therefore, it is recommended the narrative reason for his separation be amended to Secretarial Authority.

#### 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, the Board found that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, and the reason for separation. The evidence shows the applicant was honorably discharged from active duty due to homosexual admission. His discharge processing was conducted in accordance with applicable law and regulation in effect at the time. However, the Board also noted that, based upon repeal of the DADT policy, and a change in DoD policy relating to homosexual conduct, an upgrade is appropriate if 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 Board determined there were no aggravating circumstances and as a result, determined a change to the narrative reason for separation and corresponding codes is 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 2 July 1993 showing in:

- item 25 (Separation Authority): Army Regulation 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, 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. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for corrections to military records. 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 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JRB" was the appropriate code to assign to Soldiers separated under the provisions of Chapter 15 of Army Regulation 635-200, based on homosexuality. Additionally, the SPD/Reentry (RE) Code Cross Reference Table established RE code "4" as the proper RE code to assign Soldiers separated under this authority and for this reason.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5–3 (Secretarial plenary authority) provides that:

(1) 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.

(2) 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.

b. At the time, Chapter 15 stated that homosexuality was incompatible with military service and provided for the separation of members who engaged in homosexual

conduct or who, by their statements, demonstrated a tendency to engage in homosexual conduct.

5. 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.

6. 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.

7. 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 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, 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. The DD Form 214 should be reissued in lieu of the DD Form 215 (Correction of the DD Form 214), to avoid a continued record of the homosexual separation.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. 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 on the basis of equity, injustice, or clemency grounds, Boards 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.

//NOTHING FOLLOWS//