

IN THE CASE OF: ██████████

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230008916

APPLICANT REQUESTS: his uncharacterized service be characterized as honorable.

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

Online Application, dated 6 June 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applicant states, in effect, due to being discharged under the Don't Ask Don't Tell (DADT) policy and it since being repealed, he requests his discharge be upgraded to reflect honorable. He also states, had he not been discharged under DADT, he would have been afforded the opportunity to serve.
3. The applicant enlisted in the Regular Army on 4 January 2005 for a period of 5 years and 19 weeks. He was not awarded a military occupational specialty.
4. A DA form 2823 (Sworn Statement) from the applicant. dated 2 June 2005, states on 31 May 2005 he was caught kissing another male Soldier in the latrine. The next day he brought it to his Drill Sergeant's attention because he was afraid someone may hurt him due to his sexual preference.
5. On 7 June 2005, the applicant received a developmental counseling which shows he was being recommended for separation in accordance with Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 15 (Discharge for Homosexual Conduct), for homosexuality, through admission and a written sworn statement. The applicant admitted to engaging in a homosexual act while in military service. The applicant agreed with the counseling.

6. On 15 June 2005, the applicant's company commander notified the applicant of the intent to initiate the applicant's separation. The reasoning of the proposed action was based on the voluntary admission from the applicant stating he was a homosexual, the belief that the applicant would continue to commit homosexual acts, and the applicant's refusal of conforming to military standards. The commander recommended the applicant receive an entry level separation.
7. The applicant acknowledged receipt of the proposed separation notification on 15 June 2005. He declined to consult with counsel and waived consideration, a personal appearance and consulting counsel before an administrative board. He did not make a statement in his own behalf and additionally understood he may encounter substantial prejudice in civilian life.
8. On 15 June 2005, the applicant's immediate commander formally recommended the applicant's separation from service under the provisions of AR 635-200, Chapter 15, by reason of homosexuality with an entry level separation (uncharacterized).
9. On 23 June 2005, by legal review, the applicant's chapter action was found legally sufficient to support separation for homosexual conduct in accordance with AR 635-200, Chapter 15, and AR 600-20 (Personnel- General, Army Command Policy) Chapter 4-19 (Homosexual conduct policy). Additionally adding, the applicant stated he lived a homosexual lifestyle and would continue to do so.
10. A DA Form 3822-R (Report of Mental Status Evaluation), dated 29 June 2005, shows the applicant was cleared for any administrative action deemed necessary by the command.
11. On 8 July 2005, the separation authority directed the applicant's entry -level separation with uncharacterized service, in accordance with AR 635-200, Chapter 15.
12. The applicant was discharged on 26 September 2005. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was credited with completing 8 months and 23 days of net active service and contains the following entries in:
  - item 24 (Character of Service) – Uncharacterized
  - item 25 (Separation Authority) – AR 600-8-24 [Personnel – General, Officer Transfers and Discharges], Paragraph 4-22 [Rules for processing an elimination of an officer for homosexual conduct]
  - item 26 (Separation Code) – JRA
  - item 27 (Reentry Code) – 4
  - item 28 (Narrative Reason for Separation) – Homosexual Acts

13. 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.

14. The DADT Repeal Act of 2010 was a landmark United States 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.

15. 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.

16. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

#### 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 be a barrier to granting the relief recommended in the 20 September 2011 guidance from the Under Secretary of Defense for Personnel and Readiness. The Board determined the applicant's DD Form 214 should be reissued to show he was discharged by reason of Secretarial authority with separation code JFF, reentry code 1, and an honorable character of service.

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 reissuing his DD Form 214 to show the following entries:

- item 24 – Honorable
- item 25 – AR 635-200
- item 26 – JFF
- item 27 – 1
- item 28 – Secretarial authority

9/3/2024

X █

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CHAIRPERSON

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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. AR 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 "JRA" was an appropriate code to assign to Soldiers separated under the provisions of Chapter 15 of AR 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.

3. AR 635-200 in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. (Honorable Discharge) stated an honorable discharge was a separation with honor. The honorable characterization was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and duty performance.

b. (General Discharge) stated a general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. (Uncharacterized Separations). Soldiers separated in an entry-level status receive an uncharacterized character of service. A separation is an entry level status separation if its processing is initiated during the Soldier's first 180 days of continuous active duty. The Secretary of the Army could, on a case-by-case basis, issue an honorable character of service to entry-level Soldiers when clearly warranted by unusual circumstances involving personal conduct or duty performance.

d. 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.

e. 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.

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 United States 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 United States 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. 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.

7. 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//