

IN THE CASE OF: ██████████

BOARD DATE: 3 April 2024

DOCKET NUMBER: AR20230009248

APPLICANT REQUESTS: in effect, the separation code, reentry code, and narrative reason shown on his DD Form 214 (Certificate of Release or Discharge from Active Duty) be amended.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

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, he believes based on the repeal of Don't Ask Don't Tell (DADT) his separation code, reentry code, and narrative reason for separation should be amended.
3. Review of the applicant's service records shows:
  - a. He enlisted in the Regular Army on 16 February 2006
  - b. On 3 September 2008, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him in accordance with Chapter 15, paragraph 15-3 of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) for homosexuality. The specific reason for this proposed action: The applicant created a rebuttable presumption that indicates he engages in, attempts to engage in, have a propensity to engage in, or intends to engage in homosexual or bisexual acts. The commander advised the applicant of his rights and recommended an honorable discharge.
  - c. The applicant acknowledged receipt of the commander's notification and he subsequently consulted with legal counsel. He was advised of the basis for the

contemplated separation action for homosexuality, the type of discharge he could receive, and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights that were available to him. He requested consideration of his case by an administrative separation board contingent on receipt of no less than an honorable discharge. He did not elect to submit a statement on his own behalf.

d. After this acknowledgement, his immediate commander-initiated separation action against him in accordance with AR 635-200 by reason of homosexuality. On 3 September 2008, the intermediate commander recommended approval of the discharge action with the issuance of an honorable discharge.

e. On 3 September 2008, the separation authority approved the applicant's discharge under the provisions of Chapter 15 of AR 635-200 by reason of homosexuality with the issuance of an honorable discharge. Accordingly, the applicant was discharged on 30 September 2008.

f. On 30 September 2008, he was honorably discharged under the provisions of Chapter 15-3B of AR 635-200. He completed 2 years, 7 months, and 15 days of active service. His DD Form 214 shows in:

- Block 24 (Character of Service): Honorable
- Block 25 (Separation Authority): AR 635-200, Paragraph 15-3B
- Block 26 (Separation Code): JRB
- Block 27 (Reentry Code): 4
- Block 28 (Narrative Reason for Separation): Homosexual Conduct (Admission)

4. By regulation (AR 635-200), 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. However, Under Secretary of Defense (Personnel and Readiness) memorandum states effective 20 September 2011, Service boards 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, and RE code to an immediately-eligible-to-reenter category. For the upgrades to be warranted, the memorandum states both of the following conditions must have been met:

- the original discharge was based solely on DADT (Don't Ask Don't Tell) or a similar policy in place prior to enactment of DADT
- there were no aggravating factors in the record, such as misconduct

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined the applicant was questioned about his sexual orientation and his response influenced the discharge determination. With the circumstances discussed in this case, the Board agreed it is equitable to correct the applicant's narrative reason, separation code, separation authority and reentry code. Therefore, relief was granted.

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 30 September 2008 showing in:

- block 25 (Separation Authority): Army Regulation 635-200, paragraph 5-3
- block 26 (Separation Code): JFF
- block 27 (Reentry Code): 1
- block 28 (Narrative Reason for Separation): Secretarial Authority

5/14/2024

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. Army Regulation 635-200 (Personnel Separations) prescribes procedures for separation of enlisted personnel.
  - a. Paragraph 3-7a, an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. 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, a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 15, at the time prescribed the current criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. When the sole basis for separation is homosexuality, a discharge under other than honorable conditions may be issued only if such characterization is otherwise warranted and if 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; openly in public view; for compensation; aboard a military vessel or aircraft; or in another location subject to military control if the conduct had, or was likely to have had, an adverse impact on discipline, good order or morale due to the close proximity of other Soldiers of the Armed Forces. In all other cases, the type of discharge will reflect the character of the Soldier's service.

3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) states that SPD codes are three-character alphabetic combinations which identify reasons for and types of separation from active duty. The SPD code of "JRB" was the correct code for Soldiers separating under paragraph 15-3 for homosexuality.

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

- 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

5. The "Don't Ask Don't Tell" (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.

6. 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 DRBs and Service BCM/NRs to follow when acting 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 to change the:

- narrative reason for discharge (the change should be to "Secretarial Authority" (SPD code JFF))
- characterization of the discharge 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 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.

8. 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.

9. 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. 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. 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//