

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009958

APPLICANT'S REQUEST:

- Correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show his characterization of service as "Under Honorable Conditions (General) rather than "Uncharacterized"
- Reconsideration of his previous request to change his Reentry Eligibility (RE) Code from "4" to "1"
- To appear before the Board via video/telephone

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

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

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20100010281 on 30 September 2010.
2. The applicant states, in effect, he was discharged due to the Don't Ask, Don't Tell (DADT) policy. Since this policy has since been rescinded, his discharge is inequitable and resulted in injustice because he is unable to claim full Department of Veterans Affairs benefits or to pursue his goal of applying for a commission in the U.S. Cyber Command. Under the new policy, there is substantial doubt he would have received the same discharge status. He believes there is substantial reason to believe he would have been allowed to continue to serve.
3. On 19 April 2007, the applicant enlisted in the Regular Army for a period of 4 years in the rank/grade of private first class (PFC)/E-3. He was assigned to a unit at Fort Benning, GA for completion of Basic Combat Training (BCT).

4. On 15 May 2007, the applicant was counseled by his immediate commander regarding his self-admission that he is a homosexual. The commander advised the applicant on the Army's policy at the time regarding homosexuality and the potential consequences of his self-admission, to include the initiation of action to separate him from the Army under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Separations), Chapter 15, due to homosexual conduct (admission). He further advised the applicant that Soldiers in an entry-level status would receive an Uncharacterized service characterization unless their conduct was serious enough to warrant an other than honorable discharge under another appropriate chapter. The applicant agreed with the counseling.

5. On 24 May 2007, the applicant rendered a hand-written sworn statement wherein he acknowledged his understanding of the definitions of homosexual conduct/acts and stated he had engaged in these acts on at least six occasions between January 2004 and October 2006. None of these acts took place while he was in the Army. He revealed these facts to his commander and to Community Mental Health Services personnel for several reasons that he listed in his statement.

6. On 1 June 2007, the applicant's immediate commander counseled him regarding his intent to recommend the applicant for administrative separation under the provisions of AR 635-200, Chapter 15, due to homosexuality, based upon the applicant's sworn statement. He advised the applicant of his right to consult with legal counsel on the ramifications of this type of discharge.

7. On 4 June 2007, the applicant's immediate commander informed him that he was initiating action to separate him under the provisions of AR 635-200, Chapter 15, for homosexual conduct, based on his inquiry into the applicant's statement that he is homosexual. The applicant created a rebuttable presumption that indicated he engaged in, attempted to engage in, or had the propensity to engage in, or intended to engage in homosexual acts. He informed the applicant he was recommending that he receive an entry-level, uncharacterized discharge.

8. The applicant acknowledged receipt of the notification and rendered his election of rights wherein he elected to waive his rights to consult with counsel and to provide statements in his own behalf.

9. On 5 June 2007, the applicant's immediate commander formally recommended the applicant's involuntary separation under the provisions of AR 635-200, Chapter 15, based upon homosexual conduct statement. The commander noted the applicant had not completed BCT and had not been awarded a Military Occupational Specialty (MOS). The intermediate commander concurred with the recommendation for separation with an entry-level, uncharacterized discharge.

10. On 25 June 2007, the separation packet was reviewed by an Attorney-Advisor and was found to be legally sufficient.

11. The separation authority approved the recommended separation and directed that the applicant be discharged and receive an entry-level uncharacterized service characterization.

12. Orders and the applicant's DD Form 214 show he was discharged in the rank or PFC on 29 June 2007. He was credited with completion of 2 months and 12 days of net active service. He had not completed his first full term of service and was not awarded a MOS. His DD Form 214 further shows in:

- item 24 (Character of Service) – Uncharacterized
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA [Paragraph] 15-3B
- item 26 (Separation Code) – JRB
- item 27 (Reentry Code) – 4
- item 28 (Narrative Reason for Separation) – Homosexual Conduct (Admission)

13. Soldiers are considered to be in an entry-level status when they are within their first 180 days of active-duty service. The evidence of record shows the applicant was in an entry-level status at the time of his separation. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It simply means the Soldier was not in the Army long enough for his or her character of service to be rated as honorable or otherwise.

14. 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.

15. 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.

16. 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, U.S. Code (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.

17. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

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 evidence shows the applicant was discharged from active duty due to homosexual acts and/or admission, prior to completing initial entry training and award of an MOS. He was appropriately issued an uncharacterized discharge. His discharge processing was conducted in accordance with applicable law and regulation in effect at the time. The Board found no error or injustice in his separation processing. The Board found it likely that had the command not initiated separation action against him for homosexuality, he was likely to complete initial entry training. Additionally, 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 amendment of the ABCMR's decision in Docket Number AR20100010281 on 30 September 2010. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 29 June 2007 to show:

- item 24 (Characterization of Service): Honorable
- 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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR.
2. Army Regulation 635-5, in effect at the time of the applicant's active duty service, prescribed the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It established standardized policy for the preparation of the DD Form 214. It provided that the DD Form 214 is a synopsis of the Soldier's most recent period of continuous active service. The DD Form 214 provides a brief, clear-cut record of active Army service at the time of release from active duty, retirement, or discharge.
3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
  - a. 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 3-9, in effect at the time of the applicant's separation, provided that a separation would be described as entry level with uncharacterized service if processing was initiated while a Soldier was in an entry-level status (within 180 days of continuous active duty), except when:
    - (1) a discharge under other than honorable conditions was authorized, due to the reason for separation and was warranted by the circumstances of the case; or
    - (2) the Secretary of the Army, on a case-by-case basis, determined a characterization of service as honorable was clearly warranted by the presence of unusual circumstances involving personal conduct and performance of duty. This characterization was authorized when the Soldier was separated by reason of selected changes in service obligation, for convenience of the government, and under Secretarial plenary authority.

c. 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.

d. The character of service for Soldiers separated under this provision would normally be honorable, but would be uncharacterized if the Soldier was in an entry-level status. An uncharacterized discharge is neither favorable nor unfavorable; in the case of Soldiers issued this characterization of service, an insufficient amount of time would have passed to evaluate the Soldier's conduct and performance.

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 (Character of Service) 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 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.

//NOTHING FOLLOWS//