

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 May 2024

DOCKET NUMBER: AR20230010082

APPLICANT REQUESTS:

a. correction of her DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 25 April 1986 based on repeal of "Don't Ask, Don't Tell" (DADT) as follows:

- item 25 (Separation Authority)
- item 26 (Separation Code)
- item 27 (Reentry Code)
- item 28 (Narrative Reason for Separation)

b. a personal appearance hearing before the Board (via video/telephone).

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Case Summary Brief, undated
- 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 she was a respected and hard working Army officer. She excelled at the Military Intelligence Officer Basic Course and Tactical Surveillance Officer Course and was excited to begin her career as an officer in the U.S. Army. Unfortunately, she was targeted, isolated, and investigated for being homosexual. On 25 April 1986, she was discharged for the good of service, citing homosexual conduct in lieu of trial by court-martial as the reason for her separation from the Army.

a. Her DD Form 214 lists her character of service as "Honorable," separation code as "In Lieu of Trial by Court-Martial," reenlistment code as "NA [not applicable]," separation authority as "AR 635-120, chap 5 [Army Regulation 635-120, Chapter 5]," and narrative reason for separation as "Conduct Triable by Court-Martial." The Army only offered her two options, neither of which allowed her to continue serving in the Army. The Army told her she could be tried by court-martial with media present and likely receive a discharge under other than honorable conditions or she could waive her rights and receive a less punitive discharge. For a less punitive discharge, she would have to agree to stay quiet and agree not to go to the media. She chose to keep her sexual orientation from becoming public knowledge. Ashamed and afraid, she hid her discharge and her sexual orientation. Being gay at the time was unsafe and the fear of never gaining or maintaining employment based on her sexual orientation going public was debilitating. She did not know then that her DD Form 214 would plague her regardless of which option she chose by listing conduct triable by court-martial due to her sexual orientation as the reason for her discharge.

b. Since her discharge, the military has changed the policy concerning the service of lesbian, gay, and bisexual persons. The Department of Defense has recognized that this policy change entitles many lesbian, gay, and bisexual veterans to update their DD Forms 214. Additionally, through the repeal of DADT, the Government has acknowledged that a Soldier's sexual orientation has no bearing on his or her fitness for military service, and consensual sexual activity between members of the same sex no longer constitutes valid grounds for discharge.

3. Following prior enlisted service in the Army National Guard, she was appointed as a Reserve commissioned officer of the Army on 16 May 1981.

4. U.S. Army Reserve Components Personnel and Administration Center Orders A-06-006459, 2 June 1983, ordered her to active duty for a period of 3 years with a reporting date of 15 June 1983.

5. On 26 February 1986, she voluntarily submitted her resignation for the for the good of the service under the provisions of Army Regulation 635-120 (Officer Resignations and Discharges). She acknowledged:

a. She did not desire to appear before a court-martial or board of officers; she was not the subject of coercion with respect to her resignation; and she was advised of and fully understood the implications of her action.

b. Having been advised prior to submitting her resignation, she may, at her option, consult with and be represented by legally qualified military counsel or civilian counsel retained by her. She elected to exercise her right to counsel.

c. She was afforded an opportunity to present matters in explanation, mitigation, or defense of her case and elected to remain silent.

d. She understood her resignation, if accepted, could be considered as under other than honorable conditions and that a Discharge under Other Than Honorable Conditions Certificate could be issued.

6. On 26 February 1986, her battalion commander recommended approval of her resignation under the provisions of Army Regulation 635-120, paragraph 5-1a(3), for homosexuality and issuance of an Honorable Discharge Certificate.

7. On 4 March 1986, she underwent a mental status evaluation. The DA Form 3822-R (Report of Mental Status Evaluation) shows she was psychiatrically cleared for any administrative action deemed appropriate by her command.

8. The 109th Military Intelligence Battalion Combat Electronic Warfare Intelligence (CEWI), 9th Infantry Division (Motorized), report of investigation states, in part:

On 19 Feb[ruary] 1986, statements were made directly to the Battalion Commander by two (2) individuals, to the effect that [Applicant], Co[mpany] D, 109th MI Bn [Military Intelligence Battalion] (CEWI), 9th Inf Div (MTZ) [Infantry Division Motorized] was in fact a homosexual and involved in homosexual activities. The information related to the Battalion Commander concerned direct observation of personal correspondence (letters) relating to [Applicant] and to a homosexual relationship.

On 21 Feb[ruary] 1986, upon her return from TDY [temporary duty], [Applicant] was interviewed by the Battalion Commander and asked directly by him if she [Applicant] was in fact a homosexual. She stated that she was. Subsequent questioning developed no relevant information except that she denied any sexual involvement with any soldier subordinate to her or with any member of this command. She refused to divulge the names of any other homosexuals.

[Applicant] was immediately relieved of her duties in Co[mpany] D and reassigned to HHC [Headquarters and Headquarters Company], 109th MI Bn (CEWI) for limited duty until released from active service. She was asked to initiate a letter of resignation for the good of the service, which she has done.

9. On 14 March 1986, the acting division commander recommended approval of her resignation under the provisions of Army Regulation 635-120, paragraph 5-1a(3), and issuance of an Honorable Discharge Certificate.

10. On 9 April 1986, the Deputy Assistant Secretary of the Army (Review Boards, Personnel Security, and Equal Employment Opportunity Compliance and Complaints Review) approved her resignation for the good of the service with an honorable discharge.

11. She was honorably discharged on 25 April 1986. She completed 2 years, 10 months, and 13 days of net active service during this period. Her DD Form 214 shows in:

- item 25 (Separation Authority) – Army Regulation 635-120, chapter 5
- item 26 (Separation Code) – DFS
- item 27 (Reentry Code) – Not Applicable
- item 28 (Narrative Reason for Separation) – Conduct Triable by Court-Martial

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, 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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant admitted to homosexuality. Her chain of command gave her options between court-martial charges, or voluntarily resignation. She chose to resign in lieu of court-martial and her resignation was accepted. She was honorably separated in lieu of court-martial. Her discharge processing was conducted in accordance with applicable law and regulation in effect at the time. The Board found no error or injustice in her separation processing. However, the Board noted that although she resigned her commission, the underlying reason for her separation was her homosexuality. Thus, 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 a change to the narrative reason for separation and corresponding Separation Code, is appropriate. As a side note, officers are not assigned RE Codes.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	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 amending the applicant's DD Form 214 for the period ending 9 April 1986, to show:

- item 25 (Separation Authority): AR 635-120 (or AR 600-8-24)
- item 26 (Separation Code): KFF (or appropriate code for commissioned officers)
- item 27 (Reentry Code): NA
- 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, 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 15-185 (Army Board for Correction of Military Records) prescribes policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Board members will review all applications that are properly before them to determine the existence of an error or injustice and direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. The ABCMR will decide cases on the evidence of record; it is not an investigative body. 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. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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 635-89 (Personnel Separations – Homosexuality), 15 July 1966 and in effect at the time, prescribed the criteria and procedures for the separation of homosexual personnel from the Army.

a. Homosexual personnel, irrespective of sex, were not permitted to serve in the Army in any capacity. Prompt separation was mandatory. The regulation defined three classes of homosexuality:

- class I – involving an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate or consent
- class II – cases in which homosexual military personnel have engaged in one or more homosexual acts not within the purview of class I
- class III – consists of homosexual individuals who have not engaged in homosexual acts while in active military service

b. When an investigation clearly indicated an individual was a class II homosexual, he/she was afforded the opportunity to accept a discharge. If not accepted, the commander was to forward the case to the general court-martial convening authority for action. Action could include retention, appropriate action under the Uniform Code of Military Justice, or separation.

c. The separation approval authority determined the character of service, but honorable or general discharges were normally only awarded in cases where the Soldier had disclosed his/her homosexual tendencies when entering the service, if the Soldier served over an extended period of time, or if he/she performed in an outstanding or heroic manner.

4. Army Regulation 635-120 (Officer Resignations and Discharges), in effect at the time, prescribed procedures whereby an officer on active duty may tender his/her resignation or be discharged and whereby officers on active duty or retired officers may be dropped from the rolls of the Army. Paragraph 5-1a(3) stated an officer may submit a request for resignation for the good of the service when he/she elects to tender his/her resignation as a class II homosexual under the provisions of Army Regulation 635-89 prior to charges being preferred against him/her under the Uniform Code of Military Justice and prior to being recommended for elimination under the provisions of Army Regulation 635-105 (Personnel Separations – Elimination). (If he/she elects to resign after charges have been preferred, paragraph 5-2 applies. If he/she elects to request separation after being recommended for elimination, chapter 4 or chapter 10 of this regulation, as appropriate, applies.)

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, U.S. Code, 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. The Under Secretary of Defense for Personnel and Readiness memorandum (Correction of Military Records Following Repeal of Section 654 of Title 10, U.S. Code), 20 September 2011, 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.

a. Effective 20 September 2011, Service DRBs and BCM/NRs should normally grant requests in these cases to change the following:

- narrative reason for discharge (to "Secretarial Authority" with the SPD code of JFF)
- characterization of service to honorable
- the reentry eligibility code to an immediately-eligible-to-reenter category

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.

8. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Chapter 3 prescribes basic eligibility for prior-service applicants for enlistment and includes a list of Armed Forces reentry eligibility codes. Reentry eligibility codes do not apply to officer personnel.

9. Army Regulation 635-5 (Separation Documents), in effect at the time, established policies and procedures for completion and distribution of the DD Form 214. The specific instructions for item 27 stated Army Regulation 601-210 determines reentry eligibility and regulates assignment of the reentry code. Reentry codes are not assigned to officers and "NA" will be entered in this block for officers.

//NOTHING FOLLOWS//