

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230010739

APPLICANT REQUESTS: in effect, an upgrade of his discharge, and correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show -

- his name and gender as reflected in his Court Order, and
- amendment of the following blocks of his DD Form 214:
  - block 25 (Separation Authority) - Army Regulation 635-200, paragraph 5-1 instead of Army Regulation 635-200, paragraph 5-3
  - block 26 (Separation Code) - "JFF" instead of "JRA"
  - block 27 (Reentry Code - "1" instead of "4"
  - block 28 (Narrative Reason for Separation) - "Secretarial Authority" instead of "Homosexual (ACTS)"

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214
- Court Order from a United States (US) District State Court District
- Letter from a Plastic and Reconstruction Surgeon
- Court Order from a Superior State Court
- Driver License
- Social Security Card

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 is a transgender man who changed his legal name and gender His DD Form 214 records his old name and discloses his transgender identity, which places him at a disadvantage. The applicant also states, he was discharge under "Don't ask Don't Tell (DADT)" policies for being transgender. While in

the Army he was taking steps to actively transition. He would have completed his full term of service had he not been discharged for being transgender.

3. The Board will not consider the applicant's request for correction of his DD Form 214 to show his current name and gender marker for the following reasons:

- The DD Form 214 does not contain a block to enter gender marker, as such, gender markers are not entered on the DD Form 214; as such there is no corrective action for the Board to take.
- The court order is sufficient to justify an administratively correcting the applicant's DD Form 214, without action by the Board, to show the new name.

4. The applicant enlisted in the Regular Army on 19 January 2005.

5. On 22 September 2005, the applicant signed a sworn statement indicating he was homosexual, but he had not lived as a homosexual, because he felt it would not be socially acceptable. In advanced individual training, he met people who taught him it was acceptable to be himself. Now he wanted to live as a homosexual. He cannot remain in the military because the things he may do could conflict with regulations.

6. The applicant was notified of the commander's referral for a mental health evaluation. On 23 June 2005, the applicant declined to sign the mental health memorandum which included his statement of rights.

7. On 26 September 2005, he underwent a mental status evaluation. He was determined to be mentally responsible for his behavior, able to distinguish right from wrong, and he possessed sufficient mental capacity. There was no evidence of an emotional or mental disorder of psychiatric significance to warrant disposition through medical channels. He was psychiatrically cleared for administrative action and or training deemed appropriate by his chain of command.

8. On 26 September 2005, he also underwent a medical examination, and he was found qualified for service.

9. On 31 October 2005, the applicant's commander informed him that he was initiating action to separate him under the provisions of AR 635-200, chapter 15, for homosexuality. The commander also informed the applicant he was being recommended for an honorable characterization of service. The applicant was advised of his rights.

10. On 31 October 2005, the applicant consulted with legal counsel, and he was advised of the basis for the contemplated separation action and its effects, the rights available to him and the effect of a waiver of his rights. He waived consideration of his

case by an administration separation Board and a personal appearance before an administration separation Board and declined to submit statements in his own behalf.

11. The applicants immediate and intermediate commanders recommended the applicant's separation under the provisions of AR 635-200, chapter 15, for homosexuality prior to his expiration term of service. His intermediate commander recommended the issuance of an honorable discharge. The intermediate commander also stated the applicant was being separated for engaging in, attempting to engage in, or soliciting another person to engage in a homosexual act or acts.

12. The separation authority approved the applicant's discharge under Army Regulation 635-200, chapter 15, and directed an honorable characterization of service.

13. On 9 November 2005, the applicant was honorably discharged. His DD Form 214 contains the following entries:

- Separation Authority – 635-200, Paragraph 15-3A
- Separation Code – JRA
- RE Code – 4
- Narrative Reason for Separation – Homosexual (ACTS)

14. In 1993, the "Don't Ask – Don't Tell" (DADT) policy was implemented; under this policy the military was banned from investigating service members based on their sexual orientation. In 2011, the Under Secretary of Defense (Personnel and Readiness) issued guidance stating Boards should normally grant requests for character of service upgrades when the former Soldier's separation was due to DADT or a similar earlier policy. The guidance authorized Boards to amend the Soldier's narrative reason for discharge, modify their character of service to honorable, and change the RE code to reflect immediate eligibility for reentry. For the above upgrades to be warranted, the original discharge had to be based solely on DADT (or a similar policy in place prior to enactment of DADT), & no other aggravating factors in the record, such as misconduct.

#### BOARD DISCUSSION:

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 acts and/or admission. 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. 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:

In addition to the corrections addressed in Administrative Note(s) below, 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 November 2005 to show:

- 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.

ADMINISTRATIVE NOTE(S): Reissue the applicant's DD Form 214 listing his new legal name. Do not make any entry in item 18 to indicate this form was reissued or that he previously held another name.

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, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5-3 (Secretarial plenary authority), provided, 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.

b. Chapter 15 established policies concerning homosexual conduct, including statutory provisions, pertinent definitions, and commander guidelines for fact-finding inquiries. AR 195-2 provides guidance on criminal investigation of sexual misconduct. Paragraph 15-3a was applicable to Soldiers The soldier has engaged in, attempted to engage in, or solicited another person to engage in, a homosexual act.

3. The Don't-Ask-Don't-Tell (DADT) policy was implemented in 1993 during the Clinton administration. 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.

4. 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 Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to follow when taking action on applications from former service members discharged under DADT or prior policies.

a. The memorandum states that, effective 20 September 2011, Service DRBs should 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
- the RE 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 and there were no aggravating factors in the record, such as misconduct.

c. 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.

d. 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 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.

//NOTHING FOLLOWS//