IN THE CASE OF: [redacted]

BOARD DATE: 21 June 2024

DOCKET NUMBER: AR20230011177

APPLICANT REQUESTS: in effect, payment for 2 years of military service.

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

- DD Form 149 (Application for Correction of Military Record)
- Orders 2-1, 2 July 1976 (Discharge Orders)
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings, AR20210012837, 8 June 2022
- Orders 23-164-000106a, 13 June 2023 (Discharge Orders)
- Orders 23-164-000105a, 13 June 2023 (Revocation of Discharge Orders)
- Honorable Discharge Certificate
- Letter from Defense Finance and Accounting Service (DFAS), 10 August 2023
- E-mail Correspondence with an Army Review Boards Agency (ARBA) Representative

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 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 the ABCMR upgraded his under honorable conditions (General) discharge to honorable. He included the ABCMR decision for the Board's consideration. He was enlisted for a 6- year term in the U.S. Army Reserve (USAR) in 1972. Because he was homosexual, he was given an under honorable conditions (General) discharge 2 years prior to the end of his contract. The Board agreed his discharge should have been honorable and that there was no valid reason he should have been discharged at all 2 years before the end of his contract. He was a specialist four (SP4) upon his discharge and he feels he is owed for the remaining 2 years at the SP4 pay rate for a Soldier in the USAR.

3. The applicant provides the following:

a. ABCMR Record of Proceedings AR20210012837, 8 June 2022, wherein the Board granted relief for an upgrade of his characterization of service concerning his discharge from the USAR.

b. Orders 23-164-000106a, published by Headquarters, USAR Command (USARC), 13 June 2023, honorably discharging him from the USAR, effective 2 July 1976.

c. Orders 23-165-000105a, published by USARC, 13 June 2023, revoking Orders 2-1, Headquarters, First United States Army.

d. Correspondence from ARBA, 25 April 2023 and 16 June 2023, informing the applicant his request for an upgraded discharge had been approved.

e. An Honorable Discharge Certificate shows he was honorably discharged from the Army on 2 July 1976.

f. Letter from DFAS, 10 August 2023, states they had received a copy of AR20210012837. As a result of the correction to his records, there was no monetary benefit due to him from DFAS. The directive upgraded his discharge from under honorable conditions (General) to honorable. Since an under honorable conditions discharge provides the same separation entitlement as an honorable discharge, he had received all funds to which he was entitled. His DD Form 827 claim form stated he continued to serve an additional 2 years, however, DFAS would need additional supporting documentation to state a different discharge date.

g. Self-authored email, which shows his MRI results that he had cancer. The applicant was requesting expedition of his application.

4. The applicant's service records show:

a. He enlisted in the USAR on 8 September 1972 for a period of 6 years.

b. DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he entered Active Duty, as a member of the USAR, on 10 November 1972 and was honorably released to his USAR unit on 27 April 1973. He had completed 5 months and 18 days of active duty service.

c. DA Form 20 (Enlisted Qualification Record) shows his ready reserve obligation termination date as 7 September 1978. He was discharged from the USAR on 2 July 1978 with an under honorable conditions (General) discharge.

d. Orders 2-1, published by Headquarters, First United States Army, 2 July 1976 discharged the applicant from the USAR with an under honorable conditions (General) discharge effective 2 July 1976. He was issued a General Discharge Certificate.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition and available military records, the Board found the applicant enlisted in the U.S. Army Reserve on 8 September 1972 for a period of 6 years. Prior to the expiration of the applicant's term of service, he was involuntarily discharged on 2 July 1976; completing approximately 4 years of creditable service. The Board noted the applicant's contention of homosexuality being the reason for separation prior to the completion of his term of service. The Board concluded the applicant did not complete the remaining 2 years of his service obligation and therefore denied relief to grant him payment of 2 years of entitlements.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

7/10/2024

X [redacted]

CHAIRPERSON

[redacted]

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 635-89, in effect at the time, prescribed the criteria and procedures for the separation of homosexual personnel from the Army.

a. The regulation stated homosexual personnel, irrespective of sex, could not 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 was accompanied by assault or coercion, or where the person involved did not willingly cooperate or consent
- Class II – cases in which homosexual military personnel had engaged in one or more homosexual acts not within the purview of class I
- Class III – consisted of homosexual individuals who had not engaged in homosexual acts while in active military service

b. When investigation clearly indicated an individual was a class II homosexual, commanders were to afford him/her the opportunity to accept a discharge. If not accepted, the commander forwarded the case to the general court-martial convening authority (GCMCA) for action. The GCMCA's action could include retention, appropriate action under the Uniform Code of Military Justice (UCMJ), or separation.

c. The separation approval authority determined the character of service, but honorable or general discharges were normally only awarded for cases where: the Soldier had disclosed his/her homosexual tendencies upon entering the service; the Soldier had served over an extended period; or if he/she had performed in an outstanding or heroic manner. Upon discharge determination, the separation authority directed the Soldier's reduction private (PV1)/E-1.

3. The Department of Defense implemented the "Don't Ask - Don't Tell" (DADT) policy in December 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.

a. Under Secretary of Defense (Personnel and Readiness) memorandum, dated 20 September 2011, with the 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) regarding discharges based on DADT or prior policies. The memorandum states, effective 20 September 2011, Service BCM/NRs and 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
- RE code to an immediately-eligible-to-reenter category

b. The memorandum states BCM/NRs and DRBs may grant upgrades when applicants have met the following conditions: DADT, or similar prior policy, was the sole basis for the original discharge, and there were no aggravating factors in the record, such as misconduct. The memorandum further states that, although BCM/NRs and DRBs must evaluate each request on a case-by-case basis, the award of an honorable or general discharge normally affirms the absence of aggravating factors.

c. The memorandum also recognized that, although BCM/NRs have a significantly broader scope of review and have the authority to provide much more comprehensive remedies than 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 Congress repealed DADT, 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 fact separation authorities issued an applicant 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//