

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 July 2024

DOCKET NUMBER: AR20230012721

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

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 he believes his DD Form 214 should not state anything to do with homosexual language even if there was any truth in the allegations. He did not know this information was going to be on his DD Form 214. He had a car stolen while stationed in Germany and was brought in to talk about that. It turned into what felt like a witch hunt. He had a lawyer to fight the discharge and was being threatened with a dishonorable discharge under Don't Ask Don't Tell (DADT). He was told that if he stopped fighting the discharge then he would have the DD Form 214 state the discharge was "Honorable." He believes he was one of the first to be discharged under DADT and, even if DADT was acceptable, the accusations [incomplete sentence].
3. Review of the applicant's service records shows:
 - a. He enlisted in the Regular Army on 24 April 1991.
 - b. A U.S. Army Criminal Investigation Command Report of Investigation, dated 15 January 1994 shows the applicant was involved in sodomy. The Report of Investigation reveals an individual stated he and the applicant had a homosexual relationship, which involved sexual acts. the individual also stated he and the applicant lived together at his apartment where they performed oral sex on each other numerous

times. The applicant admitted to performing fellatio one time but the other individual related that the applicant performed oral sex on him numerous times.

c. On 23 March 1994, 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 (Personnel Separations – Enlisted Personnel) for homosexuality. The specific reason for this proposed action: The applicant admitted to engaging in homosexual acts with another person of the same sex or gender during the period of his current active duty enlistment, and that his conduct is incompatible with military service. The commander advised the applicant of his rights and recommended an honorable discharge.

d. Also on 23 March 1994, the applicant acknowledged receipt of the commander's notification and he subsequently consulted with legal counsel. He was advised of the bases 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 waived consideration of his case by an administrative separation board and appearance before such board contingent on receipt of no less than an honorable discharge. He provided a statement in which he stated:

- he does not feel that the statement contained in the chapter packet is reflective of his true sexual preference.
- the military police acted inappropriately when they decided to question him in regard to his homosexual conduct.
- he does not consider himself a homosexual and this was an isolated incident; he has never gotten in any sort of trouble

e. After this acknowledgement and election of rights, his immediate commander, initiated separation action against him in accordance with AR 635-200 by reason of homosexuality. It states he has admitted to engaging in homosexual acts with another person of the same gender or sex during his current enlistment. The intermediate commander recommended approval of the discharge action with the issuance of an honorable discharge.

f. On 2 March 1994, 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 1 April 1994.

g. His DD Form 214 shows he was discharged under the provisions of Chapter 15-3A of AR 635-200 due to Homosexual Acts with an honorable characterization of

service. He completed 2 years, 11 months, and 23 days of active service. His DD Form 214 shows in:

- Block 25 (Separation Authority): AR 635-200, Paragraph 15-3A
- Block 26 (Separation Code) JRA
- Block 27 (Reentry Code) 4
- Block 28 (Narrative Reason for Separation) Homosexual Acts.

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 and all supporting documents, 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 review based on law, policy, regulation, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant was discharged from active duty due to homosexual acts. The Board found no error or injustice in his separation processing. However, the Board found based upon repeal of the "Don't Ask, Don't Tell" policy and a change in Department of Defense policy relating to homosexual conduct, an upgrade is appropriate if the original discharge was based solely on homosexuality or a similar policy in place prior to enactment of "Don't Ask, Don't Tell" and there were no aggravating factors in the record. The Board determined there were no aggravating circumstances and as a result, determined a change to the characterization of service, 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 relief. 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 1 April 1994 to show in:

- item 24 (Character 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

■

■

■

■

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//