

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 August 2024

DOCKET NUMBER: AR20230013554

APPLICANT REQUESTS: correction of her military records by changing the narrative reason for separation from "Admission of Homosexuality" and the corresponding Separation and Reentry Codes.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

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 The applicant states, on 20 September 2011, Congress repealed the law known as "Don't Ask, Don't Tell" allowing courageous gay, lesbian, and bisexual service members to serve the country they love without hiding who they love and paving the way for the inclusion of all LGBTQ+ troops in our military. On 20 September 2023, DOD announced it will proactively review military records of veterans whose military records indicate their administrative separation was the result of their sexual orientation and who received a less than honorable conditions discharge. Although, she received an honorable discharge, she is requesting the removal of separation code, reentry code and narrative for separation. She is requesting that a new separation code, reentry code and narrative for separation be replaced on her DD Form 214 (Certificate of Release or Discharge from Active Duty) with jargon/code that will not disclose my sexual orientation and/or preference, incriminate or discriminate against her in anyway moving forward . She has been discriminated against with this annotated on her DD Form 214.
3. Review of the applicant's service records shows:
 - a. She enlisted in the Regular Army on 29 September 2004. She held military occupational specialty 92B, Food Service Specialist. She served in Korea from June 2005 to June 2006. She held the rank of specialist/E-4.

b. On 24 April 2006, she submitted a sworn statement to the Commander of 57th Military Police Company, that states "Based on your statement that you made to me on 14 April 2006 that you are a homosexual and that you intend to conduct/engage in homosexual activity in the future" and "I state clearly that my mother [Name] can testify that I am a homosexual and live that lifestyle. I have co-workers that are military and ex-military that can testify as well. NCOIC [Name] knows that I have struggled with this issue since he has been my leadership."

c. On 22 July 2006, the applicant's immediate commander notified the applicant of his intent to initiate separation action against her in accordance with chapter 15, paragraph 15-3 of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) for Homosexual Conduct. The reason for the proposed action is: She has created in a rebuttable presumption that indicates she engages in, or has a propensity to engage in, or intend to engage in homosexual or bisexual acts. The commander advised the applicant of her rights and recommended an honorable discharge.

d. Also on 22 July 2006, the applicant acknowledged receipt of the commander's notification and on 26 July 2006, she subsequently consulted with legal counsel. She was advised of the bases for the contemplated separation action for propensity for homosexual conduct, the type of discharge she 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 her. She understood that she is entitled to have her case considered by an administrative separation board because she is being considered under Chapter 15 (homosexual conduct).

- Prior to completing this form, she was afforded the opportunity to consult with consulting counsel and to consider whether or not to submit a conditional waiver.
- She is voluntarily waiving consideration of her case by an administrative separation board contingent upon her receiving a characterization of service or description of separation no less favorable than honorable.
- Statements in her own behalf are not submitted herewith.
- She is making this request of her own free will and had not been subjected to any coercion whatsoever by any person.
- If the separation authority refuses to accept this conditional waiver of a hearing before an administrative separation board, her case will be referred to an administrative separation board. In that case, she requests personal appearance before an administrative separation board.

e. After this acknowledgement and election of rights, her immediate commander, initiated separation action against her in accordance with AR 635-200 by reason of homosexuality. It states the applicant has created in a rebuttable presumption that indicates she engages in, attempts to engage in, or has the propensity to engage in, or

intends to engage in homosexual or bisexual acts. The intermediate commander recommended approval of the discharge with the issuance of an honorable discharge.

f. The applicant underwent a mental status evaluation and a medical examination. She was found mentally fit for administrative separation. She was also found medically qualified for separation.

g. Following a legal review for legal sufficiency, 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 Certificate.

h. Accordingly, the applicant was discharged on 8 August 2006. The DD Form 214 (Certificate of Release or Discharge from Active Duty) she was issued shows she was honorably discharged under the provisions of chapter 15-3B of AR 635-200 due to Homosexual Admission. She completed 1 year, 10 months, and 10 days of active service. Her DD Form 214 shows in:

- Block 24 (Character of Service): Honorable
- Block 25 (Separation Authority): AR 635-200, Paragraph 15-3B
- Block 26 (Separation Code) JRB
- Block 27 (Reentry Code) 4
- Block 28 (Narrative Reason for Separation) Homosexual Admission

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 and there were no aggravating factors in the record, such as misconduct.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant admitted to being a homosexual. As a result, her chain of

command, initiated separation action against her for homosexuality. The Board found no error or injustice in her separation processing. The Board also considered the change in policy upon the repeal of DADT. The Board found no underlying misconduct associated with the applicant's separation under DADT. Therefore, based on a preponderance of available evidence, and the repeal of DADT, the Board determined that a correction to the authority and narrative reason, and associated codes, for her separation was 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 a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the DD Form 214 for the period of service ending 8 August 2006 as follows:

- item 25 (Separation Authority): AR 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

8/14/2024

X

CHAIRPERSON

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 (Active Duty Enlisted Administrative 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//