

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 August 2024

DOCKET NUMBER: AR20230014152

APPLICANT REQUESTS: an upgrade of his characterization of service from under honorable conditions to honorable based on the repeal of Don't Ask, Don't Tell (DADT).

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

- DD Form 149 (Application for Correction of Military Record), 4 October 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 14 May 1985

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 was mercilessly bullied by other Soldiers in his platoon so much that he feared for his health and safety. He had his mattress turned over, his underwear hung from a ceiling, he was taunted in public, and he reported these incidences to his superiors, and nothing was done. He loved the Army and did not want to leave; he felt as if he had no other choice. He was not receiving the support from his superiors that he needed or requested. He is requesting an honorable discharge to hold his head high knowing he served with a sense of pride.
3. On his DD Form 149, he indicates sexual assault/harassment is related to his request.
4. The applicant enlisted in the Regular Army on 13 January 1982, for a period of 4 years. He was awarded military occupational specialty 98C (Electronic Warfare and Signals Intelligence Analyst). The highest rank he attained was specialist four/E-4.
5. On 19 April 1985, the applicant was investigated due to suspicion of being homosexual. He submitted a DA form 2823 (Sworn Statement) stating, in effect, he was not a homosexual, but in the past year he had been associated with the gay community and also had homosexual encounters. Before he joined the Army, he had no idea what

it was to be a homosexual and could not conceive how someone could participate in such an act. Even though he did not consider himself to be a homosexual, he did plan on remaining, and after leaving the Army, residing within the gay community.

6. On 24 April 1985, the applicant's immediate commander notified him of the intent for separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 15 (Separation for Homosexuality). Additionally stating the applicant had homosexual encounters and he had signed a sworn statement to this act.

7. The applicant consulted with legal counsel on 25 April 1985, and was advised of the basis for the contemplated separation action and its effects, the rights available to him and the effects of a waiver of his rights. He understood he may expect to encounter substantial prejudice in civilian life and elected to submit a statement in his own behalf; however, his official military personnel file is void of this statement.

8. On the same date, the applicant's immediate commander formally recommended he be discharged under the provisions of AR 635-200, Chapter 15, for homosexuality, stating he did not consider it feasible or appropriate to effect other deposition in the case because the applicant stated he would continue to be involved in such action.

9. A DA Form 3822-R (Report of Mental Status Evaluation), dated 26 April 1985, shows the applicant was mentally capable to understand and participate in board proceedings deemed appropriate by command. The examining psychiatrist noted the applicant identified himself as "homosexual."

10. On 30 April 1985, the applicant's intermediate commander recommended approval for discharge under the provisions of AR 635-200, Chapter 15. Adding, the applicant did not make any statement in his behalf.

11. The separation authority approved the recommended discharge on 3 May 1985 and directed the issuance of a General Discharge Certificate.

12. The applicant was discharged on 14 May 1985, under the provisions of AR 635-200, Chapter 15, by reason of homosexuality, in the grade of E-4. His DD Form 214 confirms his service was characterized as under honorable conditions. He was credited with 3 years, 4 months, and 2 days of net active service this period. He was awarded or authorized the following decorations, medals, badges, citation, and campaign ribbons:

- Good Conduct Medal
- Army Achievement Medal
- Army Service Ribbon
- Overseas Service Ribbon

- Rifle M-16 (Sharpshooter)
- Hand Grenade (Sharpshooter)

13. 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.

14. The DADT Repeal Act of 2010 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.

15. The Under Secretary of Defense for Personnel and Readiness memorandum, dated 20 September 2011, Subject: Correction of Military Records Following Repeal of Section 654 of Title 10, USC, 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.

16. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

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 DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant was discharged from active duty due to homosexual admission/acts. The Board found no error or injustice in the separation processing. However, the Board found based upon repeal of the "Don't Ask, Don't Tell" policy and a change in DoD 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 narrative reason for separation and corresponding codes is appropriate.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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| █ | █ | █ | 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 FSM's DD Form 214 to show:

- 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

2/13/2025

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. AR 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5–3 (Secretarial plenary authority) provides that:

(1) 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.

(2) Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers. When used in the latter circumstance, it is announced by special Headquarter, Department of the Army directive that may, if appropriate, delegate blanket separation authority to field commanders for the class category of Soldiers concerned.

b. At the time, Chapter 15 stated that homosexuality was incompatible with military service and provided for the separation of members who engaged in homosexual conduct or who, by their statements, demonstrated a tendency to engage in homosexual conduct.

3. 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.

4. The DADT Repeal Act of 2010 (Title 10, USC, 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.

5. Under Secretary of Defense for Personnel and Readiness memorandum, dated 20 September 2011, Subject: Correction of Military Records Following Repeal of Section 654 of Title 10, USC, provides policy guidance for Service DRBs and Service BCM/NRs to follow when taking action on applications from former service members discharged under DADT or prior policies.

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

- item 24 to "Honorable"
- item 25 to "Army Regulation 635-200, paragraph 5-3"
- item 26 to "JFF"
- item 27 to "1"
- item 28 to "Secretarial Authority"

b. For the above upgrades to be warranted, the memorandum states both of the following conditions must have been met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) 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 (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, 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.

//NOTHING FOLLOWS//