

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230014265

APPLICANT REQUESTS:

- an upgrade of his general, under honorable conditions discharge
- a personal appearance before the Board via video or telephone

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 formally requests an upgrade of their general, under honorable conditions characterization of service to honorable. Additionally, they ask that the new DD Form 214 (Certificate of Release or Discharge from Active Duty) not include any remarks indicating that it was corrected due to "sexual orientation is a personal and private matter," as per the memorandum issued by the Under Secretary of Defense, dated, 28 January 2011, Subject: Repeal of Don't Ask Don't Tell and Future Impact on Policy. The applicant is concerned that such remarks could lead to inquiries about the correction. His discharge was unjust because the sole reason was for homosexual admission.
3. A review of the applicant's service record shows:
 - a. Having had prior honorable service in the Texas Army National Guard, he enlisted in the Regular Army on 1 February 2001.
 - b. On 20 August 2001, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation 635-200, (Personnel Separations – Enlisted Personnel), Chapter 15, due to homosexual conduct. The proposed recommendation was based on presumptions suggesting that the

applicant had engaged in, or had a propensity to engage in, homosexual or bisexual acts. Notably, the service record is void of the applicant's acknowledgment of the notification of separation action.

c. After consulting with legal counsel, the applicant acknowledged:

- the rights available to him and the effect of waiving said rights
- he requested consideration of his case by an administrative separation board
- he requested personal appearance before an administrative board
- he may encounter substantial prejudice in civilian life if a general discharge under other than honorable conditions is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the Army Board for Correction of Military Records for upgrading
- he is ineligible to apply for enlistment in the U.S. Army for a period of 2 years after discharge

d. On an unspecified date, the immediate commander initiated separation proceedings against the applicant. The commander recommended that the applicant receive an Honorable Discharge Certificate. The intermediate commander recommended approval and that the applicant be issued a General Discharge Certificate.

e. On 15 October 2001, the applicant received notification to appear before an Administrative Separation Board on 15 November 2001. The applicant acknowledged receipt of the notification on 31 October 2001.

f. On 11 December 2001, the applicant received notification to appear before the Board of Officers on 14 Decembers 2001.

g. On 14 December 2001, the Administrative Separation Board determined that the allegations in the Notification of Administrative Separation were substantiated by a preponderance of evidence, justifying separation. The board recommended the applicant be separated with a general, under honorable conditions discharge, under the provisions of Army Regulation 635-200, Chapter 15, due to homosexual conduct.

h. On 31 January 2002, the separation authority approved the discharge recommendation for immediate separation under the provisions of Army Regulation 635-200, Chapter 15, due to homosexual conduct. The applicant would be issued a General Discharge Certificate.

i. On 1 March 2002, the applicant was discharged from active duty with a general, under honorable conditions characterization of service. The DD Form 214 shows the applicant completed 1 year, 1 month, 1 day of active service. It also shows:

- Item 25 (Separation Authority), AR 635-200, paragraph 15-3b
- Item 26 (Separation Code), JRB
- Item 27 (Reentry Code), 4
- Item 28 (Narrative Reason for Separation), Homosexual Admission

4. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

5. The Under Secretary of Defense (Personnel and Readiness) memorandum issued on 20 September 2011 states it is DOD policy that broad, retroactive corrections of records from former service members 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. An upgrade, if and when warranted, would entail a change to:

- narrative reason for discharge (to "Secretarial Authority" with the Separation Code of JFF)
- characterization of service to honorable
- the RE code to an immediately-eligible-to-reenter category

6. 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
- there were no aggravating factors in the record, such as misconduct

7. 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. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

9. By regulation (AR 635-200), in effect at the time, prescribed the criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. When the sole basis for separation was homosexuality, a discharge under other than honorable conditions could be issued only if such characterization was otherwise warranted.

10. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

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 evidence shows the applicant served on active duty from 1 February 2001 to 1 March 2002 and was discharged from active duty due to homosexual admission. He was issued an under honorable conditions (General) characterization of service. 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. The Board found it likely that had the command not initiated separation action against him for homosexuality, he was likely to remain on active duty. Additionally, based upon repeal of the Don't Ask, Don't Tell (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:

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 applicant's DD Form 214, for the period ending 1 March 2002, to show in:

- item 24 (Character of Service): Honorable
- 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

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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.

REFERENCES:

1. Title 10, United States 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 Army Board for Correction of Military Records (ABCMR) determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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 (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 15, in effect at the time, prescribed the criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. When the sole basis for separation was homosexuality, a discharge under other than honorable conditions could be issued only if such characterization was otherwise warranted and if there was 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 would reflect the character of the Soldier's service.

4. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) states SPD codes are three-character alphabetic combinations which identify reasons for and types of separation from active service. The SPD code of "JRB" was the correct code for Soldiers separating under chapter 15 for homosexuality.

5. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the RA and the United States Army Reserve. Table 3-1 included a list of the RA RE codes. RE codes are numbered 1, 3, and 4.

- 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

6. 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.

7. 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. The memorandum states that, effective 20 September 2011, Service DRBs should normally grant requests, in these cases, to change the:

- narrative reason for discharge (to "Secretarial Authority" with the SPD code of JFF)
- characterization of service to honorable
- the RE code to an immediately-eligible-to-reenter category

8. 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.

9. 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.

//NOTHING FOLLOWS//