

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230014904

APPLICANT REQUESTS:

- change of narrative reason for separation
- a personal appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 during her time in service, homosexuality was prohibited. This was something that prevented the continuation of her term. Today the same conduct is now favored. Her current narrative is preventing the right to owed benefits, and time served in Operation Enduring Freedom (OEF) is not being calculated. This is looked at as discrimination. Current laws based off narrative reason for separation have changed.
3. A review of the applicant's military record shows the following:
 - a. She enlisted in the Regular Army on 25 April 2005.
 - b. On 8 August 2006, she underwent a mental status evaluation and was cleared for Chapter 15 separation action.
 - c. On multiple dates in August 2006, DA Forms 2823 (Sworn Statement) show, in relevant part, the applicant informed members in her chain of command that she planned to marry another female (same sex) while on rest and recuperation leave.

d. On 21 August 2006, the immediate commander notified the applicant that he was initiating action to separate her under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 15, paragraph 15-3b, for homosexual conduct. The specific reasons for the proposed action were that the applicant told Staff Sergeant J_B, she planned to marry a female when she went home in August 2006 on rest and recuperation leave. The applicant admitted to the commander on 18 August 2006 that she planned to marry a female and she was aware of the consequences of that decision. The immediate commander also informed the applicant of her rights.

e. On 22 August 2006, legal counsel advised the applicant of the basis for her contemplated separation and its effects, the right available to her and the effect of a waiver of her rights.

f. Following this, the immediate commander formally recommended the applicant for separation action. On 8 September 2006, the intermediate commander recommended approval of the separation action.

g. On 10 September 2006, the approval authority directed the applicant be discharged with an honorable characterization of service.

h. The applicant was awarded the Army Commendation Medal for meritorious service while assigned as the "TDMA VSAT" Satellite Operator and the company's Network Maintainer from 3 February to 30 September 2006, in support of Operation Enduring Freedom VII, Bagram, Afghanistan.

i. On 28 November 2006, the applicant was honorably discharged from the Army in accordance with AR 635-200, paragraph 15-3b, due to Homosexual Conduct (Admission) (Separation Code JRB and Reentry Code 4). She completed 1 year, 7 months, and 4 days net active service. DD Form 214 shows she was awarded or authorized the Army Commendation Medal, National Defense Service Medal, and Army Service Ribbon.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. 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 of record shows the applicant admitted to her commander that she planned to

marry a female and she was aware of the consequences of that decision. As a result, her chain of command initiated separation action against her for homosexuality as required by existing regulation at the time. She was honorably discharged for homosexual conduct (admission). However, since the applicant's discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and since there were no aggravating factors in the record, such as misconduct, the Board determined her narrative reason for separation and corresponding codes should be upgraded.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

In addition to the correction addressed in Administrative Note(s) below, 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 a DD Form 214 for the period ending 28 November 2006, as follows:

- Separation Authority: AR 635-200
- Separation Code: JFF
- Reentry Code: 1
- 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.

ADMINISTRATIVE NOTE(S):

1. The applicant's DD Form 214 ending on 28 November 2006, should be amended by adding to:

- item 13 – Afghanistan Campaign Medal with 1 bronze service star and Global War on Terrorism Service Medal
- item 18 (Remarks) – Service in Afghanistan from 20060203 - 20060930

2. A review of the records listed below (enclosed) is sufficient to substantiate correction of the DD Form 214 without action by the Board.

- DD Form 214
- DA Form 4980-14, 30 September 2006

REFERENCES:

1. Title 10, USC, 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 15-185 (ABCMR) states, the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and it is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Paragraph 2-11 states 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. AR 635-200 (Active Duty Enlisted Administrative Separations) in effect at the time sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.
 - a. Paragraph 15-2 (Discharge policy) states, homosexual conduct is grounds for separation from the Army under the criteria set forth in paragraph 15-3. This includes preservice, prior service, or current service homosexual conduct.

b. Paragraph 15–3 (Criteria for discharge) states, a Soldier will be discharged if the Soldier has made a statement that he/she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the Soldier has demonstrated that he/she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. The Don't Ask Don't Tell (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.

5. 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 United States 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.

6. 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:

- 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

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 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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

a. 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 on the basis of 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.

b. 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.

8. AR 635-5 (Separation Documents) prescribes the separation documents that must be prepared for Soldiers on retirement, discharge, release from active duty service, or control of the Active Army. Paragraph 2-1 (Preparing the DD Form 214) states, the DD Form 214 is a summary of a Soldier's most recent period of continuous active duty. It

provides a brief, clear-cut record of active duty service at the time of release from active duty, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.

//NOTHING FOLLOWS//