

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 September 2024

DOCKET NUMBER: AR20240002153

APPLICANT REQUESTS: correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 13 April 2006, by removing any reference to homosexuality as the basis for his separation.

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 (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 believes it should not be listed as he will otherwise experience discrimination. He notes sexual assault/harassment as a condition related to his request.
3. The applicant enlisted in the Regular Army on 23 August 2005, for a 4-year period. The highest rank he attained was private/E-2.
4. In an undated statement, the applicant informed his immediate commander that he was a homosexual. He chose to share this because his lifestyle was not accepted in the military atmosphere, and he could not be himself. Some of the privates gave him a hard time, and the comments from Cadre made him uncomfortable. He has seen counselors and a therapist. He does not want to wake up every day and live a lie.
5. The applicant's immediate commander initiated a Report to Suspend Favorable Personnel Actions (FLAG), effective 23 January 2006, by reason of field initiated elimination.
6. The applicant underwent a mental status evaluation on 16 February 2006. The evaluating provider determined there was no evidence of mental defect or emotional

illness. The applicant was psychiatrically cleared for any administrative action deemed appropriate by command.

7. The applicant underwent a pre-separation medical examination on 24 February 2006. The relevant DA Form 2807-1 (Report of Medical History) and corresponding DA Form 2808 (Report of Medical Examination) shows he reported being in good health. The examining provider determined he was medical qualified for separation.

8. On 1 March 2006, the applicant was counseled by his first sergeant and was notified that he was being recommended for administrative discharge under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 15, by reason of admittance to homosexuality. The applicant agreed with the counseling and elected not to make any additional remarks.

9. On 27 March 2006, the applicant's immediate commander notified him that he was initiating action to separate him for homosexual conduct under the provisions of Army Regulation 635-200, Chapter 15, paragraph 15-3b, based upon the applicant's statement. He further advised the applicant he was recommending he receive an honorable discharge.

10. The applicant acknowledged receipt of the proposed separation notification. He consulted with legal counsel 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 elected not to submit a statement in his own behalf.

11. Subsequently, the applicant's immediate commander formally recommended the applicant's separation, prior to the expiration of his current term of service, under the provisions of Army Regulation 635-200, Chapter 15, with an honorable character of service. The intermediate commander concurred with the recommendation.

12. On 5 April 2006, through defense counsel, the applicant rendered a notification of propensity to his chain of command, under the provisions of Army Regulation 635-200, Chapter 15.

13. The separation authority approved the recommended separation action on 7 April 2006 and directed the applicant's service be characterized as honorable.

14. The applicant was discharged on 13 April 2006. His DD Form 214 shows he was credited with completing 7 months and 21 days of net active service and contains the following entries:

- item 24 (Character of Service) – Honorable
- item 25 (Separation Authority) – Army Regulation 635-200, Paragraph 15-3b

- item 26 (Separation Code) – JRB
- item 27 (Reentry Code) – 4
- item 28 (Narrative Reason for Separation) – Homosexual (Admission)

15. On 26 June 2024, in the processing of this case, the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Sexual Assault records pertaining to the applicant.

16. 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.

17. The DADT Repeal Act of 2010 was a landmark United States 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.

18. 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.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, 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 and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records the Board determined the applicant admitted to his leadership his sexual orientation and his response influenced the discharge determination. With the circumstances discussed in this case, the Board agreed it is equitable to correct the applicant's narrative reason, separation authority, separation code and reentry code. Therefore, relief was granted.

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 issuing the applicant a new DD Form 214 for the period ending 4 October 1999 showing in:

- item 25 (Separation Authority): Army Regulation 635-200, paragraph 5-3
- 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, U.S. Code (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. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JRB" was an appropriate code to assign to Soldiers separated under the provisions of Chapter 15 of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), based on homosexual conduct (statement). Additionally, the SPD/Reentry (RE) Code Cross Reference Table established RE code "4" as the proper RE code to assign Soldiers separated under this authority and for this reason.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. An honorable discharge was a separation with honor. The honorable characterization was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and duty performance.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. 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.

d. 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.

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 United States 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 Discharge Review Boards (DRB) and 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.

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 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including Post-Traumatic Stress Disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

8. 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, Boards 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.

//NOTHING FOLLOWS//