

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 November 2024

DOCKET NUMBER: AR20240002257

APPLICANT REQUESTS:

- an upgrade of her uncharacterized discharge to honorable
- a video/telephonic appearance before the Board

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

- Two DD Forms 149 (Application for the Review of Military Record)
- Permanent Order 275-0357, 2 October 2002
- Memorandum, subject: Separation Under the Provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 15, Homosexual Conduct, [Applicant], 1 October 2002
- Memorandum, subject: Separation Under the Provisions of AR 635-200, Chapter 15 [Applicant], Retraining and Holding Unit, Training Support Battalion, 30 September 2002
- Memorandum, subject: Separation Under the Provisions of AR 635-200, Chapter 15, 30 September 2002
- Three Memoranda, subject: Separation Under AR 635-200, Chapter 15, 30 September 2002
- USA MEDDAC Form 856-E (Report of Mental Status Evaluation)
- Three DA Forms 4856 (Developmental Counseling Form), 4 September 2002 and 5 September 2002 (2)
- DA Form 3881 (Rights Warning Procedure/Waiver Certificate), 4 September 2002
- DA Form 2823 (Sworn Statement), Applicant, 4 September 2002
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 4 October 2002

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 at the time of her enlistment, she was battling her sexuality. She realized she was uncomfortable in the barracks around females and felt the need to inform her leadership. Leadership was aware that applicant was married to a male with an eight-year-old child. During the time of "Don't Ask, Don't Tell" (DADT), she stressed about being gay, being in an environment that did not embrace who she was, worked in fear of not being accepted, and feared not being able to move up in her military career. She is hopeful this step will facilitate her getting the help she needs. The applicant also states she suffers from severe mental health issues.

3. The applicant provides:

a. Orders 275-0357 dated 2 October 2002 discharged the applicant from active duty with an effective date of 4 October 2002.

b. The applicant's separation proceedings packet, to be referenced in the service record.

4. A review of the applicant's service record shows:

a. She enlisted in the U.S. Army Reserve on 18 May 2002.

b. DA Form 4856 (Developmental Counseling Form), dated 4 September 2002 was issued by the drill sergeant to the applicant reiterating previous communication of her admission of homosexuality. She was notified that the counseling will be referred to the Company Commander for further counseling.

c. A Commanders inquiry was initiated on 4 September 2002. DA Form 3881 (Rights Warning Procedure/Waiver Certificate) was issued to and signed by applicant.

d. On 4 September 2002, applicant received DD Form 2823 (Sworn Statement) with provided questions. She answered the questions and signed the form.

e. On 5 September 2002, DA Form 4856 (Developmental Counsel Form) was provided to the applicant recommending separation in accordance with (IAW) AR 635-200, Chapter 15. She agreed and signed the counseling statement.

f. On 30 September 2002, the applicant's immediate commander notified the applicant of his intent to separate her under the provisions of Chapter 15, AR 635-200 for homosexual conduct. The specific reasons for his proposed recommendation were based on the written statement swearing she had engaged in homosexual activities. The statement demonstrated a propensity to continue to engage in homosexual conduct. The applicant acknowledged receipt of the notification of separation action on the same day.

f. On 12 September 2002, a mental status evaluation was completed and stated her mental status was within normal limits and she was cleared for disposition as desired by the chain of command.

g. On 30 September 2002 the immediate commander initiated separation action against the applicant for homosexual conduct. He recommended that her period of service be characterized as uncharacterized.

h. On 30 August 2001, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of Chapter 15, AR 635-200, for homosexual conduct. She would be issued an uncharacterized discharge.

i. On 4 October 2002, she was discharged from active duty with an uncharacterized characterization of service. Her DD Form 214 shows she completed 1 month and 14 days of active service. It also shows in:

- Item 11 (Primary Specialty): None//Nothing Follows
- Item 25 (Separation Authority): AR 635-200, Para 15-3B
- Item 26 (Separation Code): JRB
- Item 27 (Reentry Code): 4
- Item 28 (Narrative Reason for separation): Homosexual Admission

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

6. Under Secretary of Defense (Personnel and Readiness) memorandum states that, effective 20 September 2011, it is 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. 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

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

8. 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. 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.

10. 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.

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

BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board found that relief was not 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 and regulation. The governing regulation provides that a separation will be described as an entry-level separation, with service uncharacterized, if the separation action is initiated while a Soldier is in entry-level status. The applicant did not complete training and was released from active duty due to homosexual admission. The Board noted the applicant's admission during basic training; however, also noted she was counseled on being married to a male and having a child and that making a false official statement to get out of training was an offense punishable under the Uniform Code of Military Justice. The Board was not convinced beyond a preponderance of the evidence the applicant would have continued to serve had it not been for her admission of homosexuality. The Board determined her DD Form 214 properly shows the appropriate characterization of service as uncharacterized.

2. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It merely means the Soldier has not been in the Army long enough for his or her character of service to be rated as honorable or otherwise. As a result, there is no basis for granting the applicant's request.

3. Prior to closing the discussion, the Board determined the applicant's record requires amendment based on an injustice. The applicant's current DD Form 214 shows her narrative reason for separation and corresponding separation code and reentry code for homosexual admission. The Board concluded, based on the applicant's length of service in the military and potential prejudice she may encounter in civilian life, an amendment to her narrative reason for separation and corresponding codes to reflect entry-level status is more appropriate.

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

2. Prior to closing the discussion, 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 applicant's DD Form 214, for the period ending 4 October 2002 to show in:

- item 26 (Separation Code): JGA
- item 27 (Reentry Code): 3
- item 28 (Narrative Reason for Separation): Entry Level Performance and Conduct

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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.

10. 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.

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 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.

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//