

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 January 2025

DOCKET NUMBER: AR20240002583

APPLICANT AND COUNSEL REQUESTS:

- upgrade the characterization of service from under other than honorable conditions to honorable
- upgrade the narrative reason from AR 635-89 to Secretarial Authority
- upgrade the separation code from SPN 253 to JFF
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Counsel Case
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge'
- Repeal of Don't Ask Don't Tell and Future Impact on Policy
- Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code
- New York Certificate of Death
- Certificate of Domestic Partnership
- Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

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 counsel states that on 1 December 1964, the former service member (FSM) was discharged from the United States Army "Under Other Than Honorable Conditions" solely due to his homosexuality, despite serving honorably during the Vietnam War

without any record of misconduct. His discharge was issued under AR 635-89 with SPN 253, a regulation and code indicating separation based on homosexuality. These policies, which predated the now repealed "Don't Ask, Don't Tell" (DADT), have since been recognized as discriminatory.

a. Following the 2011 repeal of DADT, the Department of Defense (DOD) issued guidance recommending the correction of military records for those discharged under these policies, provided no aggravating factors were present. The DOD also committed to proactively reviewing records of veterans affected by such discharges.

b. The FSM's discharge significantly impacted his life, leading to strained family relationships, depression, and challenges in employment due to the stigma of his discharge status. Nevertheless, he persevered, finding meaningful employment, maintaining a long-term relationship with his domestic partner, Mr. P.M., and contributing to his community through his passion for the arts.

c. Now, 20 years after his death, Mr. P.M. requests the Army Board for Correction of Military Records (ABCMR) to upgrade W.G.W.'s service characterization to "Honorable" and amend the narrative reason for separation to "Secretarial Authority" under separation code "JFF," in the interest of justice.

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

a. He was inducted into the Army of the United States on 5 June 1963.

b. On 19 November 1964, a DA Form 19-24 (Statement) shows the FSM stated he had committed homosexual acts.

c. On 21 November 1964, the FSM underwent a mental evaluation for the purpose of separation. The report shows the FSM was mentally able to distinguish right from wrong. He understood the nature of the board proceedings and to testify on his own defense. The Chief Neuropsychiatric recommends the FSM be eliminated from service under provisions of AR 635-89 (Personnel Separations -Homosexuality).

d. On 24 November 1964, a memorandum sent to the Commanding General shows the immediate commander stated the FSM was advised and he requested to appear before a board of officers.

e. On 30 November 1964, the FSM appeared in front of a board of officers. They found the FSM had committed homosexual acts four to five times. He continued to voluntarily participate in homosexual acts. The board recommended the FSM be discharged from the Army under the provisions of AR 635-89 and be given an undesirable discharge.

f. The separation authority approved discharge of the FSM. The FSM was to be furnished an Undesirable Discharge Certificate.

g. On 1 December 1964, a Standard Form (SF) 88 (Report of Medical Examination) shows he underwent a medical evaluation for the purpose of separation which indicated he was generally in good health. The FSM was marked qualified for separation.

h. On 7 December 1964, he was discharged with an under other than honorable conditions discharge. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 1 year, 6 months, and 3 days of active service. It also shows:

- Item 11c (Reason and Authority) – AR 635-89 and SPN 253
- Item 13a (Discharge Type) – Under Other Than Honorable Conditions
- Item 13b (Type of Certificate Issued) – DD Form 258A

5. There is no indication he petitioned the Army Discharge Review Board for review of her discharge processing within that boards 15-year statute of limitations.

6. AR 635-89, then in effect, provided that personnel who voluntarily engaged in homosexual acts, irrespective of sex, would not be permitted to serve in the Army in any capacity, and their prompt separation was mandatory. Members who engaged in homosexual acts, even though they were not homosexuals within the meaning of this regulation, were considered to be unfit for military service because their presence impaired the morale and discipline of the Army.

6. An Under Secretary of Defense (Personnel and Readiness) memorandum states effective 20 September 2011, Service boards normally grant requests, in these cases, to change the: narrative reason for discharge (the change should be to "Secretarial Authority" (SPD code JFF)), characterization of the discharge to honorable, and RE code to an immediately-eligible-to-reenter category. For the upgrades to be warranted, the memorandum states both of the following conditions must have been met:

- the original discharge was based solely on DADT (Don't Ask Don't Tell) or a similar policy in place prior to enactment of DADT.
- there were no aggravating factors in the record, such as misconduct.

7. 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.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record, and published Department of Defense guidance, the Board found that relief was warranted.
2. 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. The Board found no error or injustice in his 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 characterization of service, narrative reason for separation, and corresponding codes is appropriate.
3. 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:

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 7 December 1964 to show:

- Character of Service: Honorable
- Separation Authority: Army Regulation 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): N/AREFERENCES:

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. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) prescribes procedures for separation of enlisted personnel. Chapter 15, at the time prescribed the current criteria and procedures for the investigation of homosexual personnel and their discharge from the Army. When the sole basis for separation is homosexuality, a discharge under other than honorable conditions may be issued only if such characterization is otherwise warranted and if there is 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 will reflect the character of the Soldier's service.

3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) states that SPD codes are three-character alphabetic combinations which identify reasons for and types of separation from active duty. The SPD code of "JRB" was the correct code for Soldiers separating under paragraph 15-3 for homosexuality.

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

- 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.

5. The "Don't Ask Don't Tell" (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.

6. 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 DRBs and Service BCM/NRs to follow when acting 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 to change the:

- narrative reason for discharge (the change should be to "Secretarial Authority" (SPD code JFF)
- characterization of the discharge 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 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.

8. 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.

9. 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. 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. 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.

10. 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.

//NOTHING FOLLOWS//