

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 December 2024

DOCKET NUMBER: AR20240004585

APPLICANT REQUESTS: two separate DD Forms 214 (Certificate of Release or Discharge from Active Duty) for the periods ending 30 October 2002 and 27 May 2005. In the alternative, an upgrade of her under honorable conditions (general) character of service.

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief, Center for Veterans Advancement, dated 20-February 2024
- Exhibit A, DD Form 214 (2 copies), for the period ending 27 May 2005
- Exhibit B, Department of Veterans Affairs (VA) Administrative Decision, dated 19 March 2013
- Exhibit C, DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of the United States), dated 14 August 2000
- Exhibit D, Reenlistment Documents (7 pages), dated 31 October 2002
- Exhibit E, VA Rating Decision, dated 28 July 2020
- Exhibit F, Award Certificates (5 pages), dated 17 April 2001 to 3 May 2003
- Exhibit G, DA Form 1059 (Service School Academic Evaluation Report), dated 14 April 2004
- Exhibit H, DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)), dated 3 January 2005
- Exhibit I, Enlisted Record Brief, dated 15 May 2005

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 notes post-traumatic stress disorder (PTSD) and Don't Ask Don't Tell (DADT) as conditions related to her request.

3. Counsel states, in effect:

a. The applicant's first period of service was honorable. During her second period of service, she received a general discharge for homosexual acts but had no aggravating circumstances under Title 38 of the Code of Federal Regulations (38 CFR) 3.12(d)(5). It was a single incident which could not be considered willful or persistent misconduct 38 CFR 3.12(d)(4).

b. The applicant served with honor and integrity. She is a war Veteran who participated in the initial wave of support during Operation Iraqi Freedom in 2003, and she received multiple awards for her efforts. She advanced in rank faster than her peers. Her only offense was being a "gay" Soldier during the DADT era. She currently receives VA service connected disability for PTSD due to her military service; however, she is not considered an honorable Veteran and cannot receive her education benefits. DADT was a bad policy that negatively affected honorable war Veterans.

4. The applicant enlisted in the Regular Army on 30 August 2000, for a 3-year period. Upon completion of initial entry training, she was awarded military occupational specialty 14T (Patriot Launching Station Enhanced Operator/Maintainer).

5. The applicant was deployed to Southwest Asia from 13 June 2001 to 11 July 2001.

6. She reenlisted on 31 October 2002, for a 4-year period. The highest rank she attained was sergeant (SGT)/E-5, with the date of rank of 1 May 2004.

7. An incident report shows, on 26 March 2005, the applicant and a female Airman were named as offenders for committing indecent acts in the bathroom of the Community Activity Center, at Kunsan Air Base, Republic of Korea. An individual witnessed the two committing indecent acts in the handicap stall of the ladies restroom and contacted law enforcement at approximately 0020 hours. After being advised of their rights, both the applicant and the female Airman provided statements admitting to engaging in sexual acts with each other in the bathroom stall. Both offenders were released to their units.

8. Court-martial charges were preferred against the applicant, on 18 April 2005, for violations of the Uniform Code of Military Justice. A DD Form 458 (Charge Sheet) shows the applicant was charged with sodomy and wrongfully committing an indecent act with Senior Airman [REDACTED] on or about 26 March 2005.

9. The applicant's immediate and intermediate commanders concluded that each offense was supported by evidence, and they recommended a Bad Conduct Discharge (BCD) Special Court-Martial.

10. The applicant consulted with legal counsel on 22 April 2005.

a. She was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of an under other than honorable conditions (UOTHC) discharge, and the procedures and rights that were available to her.

b. After receiving legal counsel, she voluntarily requested discharge, in lieu of trial by court-martial, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10. In her request for discharge, she acknowledged understanding that by requesting a discharge, she was admitting guilt to the charge against her, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. She acknowledged making this request free of coercion. She further acknowledged understanding that if her discharge request were approved, she could be deprived of many or all Army benefits, she could be ineligible for many or all benefits administered by the Veterans Administration, and she could be deprived of her rights and benefits as a Veteran under both Federal and State laws.

c. She was advised she could submit any statements she desired in her own behalf. She elected not to submit a statement.

11. On 9 May 2005, the separation authority approved the requested discharge and directed a UOTHC characterization of service with reduction to the lowest enlisted grade.

12. The applicant was discharged on 27 May 2005, under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial, in the rank/grade of private/E-1. Her DD Form 214 shows her character of service was UOTHC, with separation code KFS and reentry code RE-4. She completed 4 years, 8 months. She was awarded or authorized the:

- Army Commendation Medal
- Army Achievement Medal (3rd award)
- Presidential Unit Citation (Navy-Marine Corps)
- Army Good Conduct Medal
- National Defense Service Medal
- Korea Defense Service Medal
- Noncommissioned Officer's Professional Development Ribbon
- Army Service Ribbon
- Global War on Terrorism Service Medal
- Global War on Terrorism Expeditionary Medal
- Driver and Mechanic Badge with Driver-W Bar

13. The applicant's DD Form 214, Item 18 (Remarks) contains the statements "CONTINUOUS HONORABLE ACTIVE SERVICE: 20000830 – 20021030" and "MEMBER HAS COMPLETED FIRST FULL TERM OF SERVICE."

14. On 25 January 2013, the Army Discharge Review Board (ADRB), considered the applicant's request for an upgrade of her UOTHC character of service. After careful consideration, the Board determined that the characterization of service was too harsh based upon the length and quality of the applicant's service. The Board voted to grant relief in the form of an upgrade of her character of service to under honorable conditions (general), which also entailed restoration of her rank/grade to SGT/E-5.

15. On 1 May 2013, the applicant was issued a corrected DD Form 214, showing Items 4a (Grade, Rate, or Rank) and 4b (Pay Grade) as SGT/E-5 and Item 24 (Character of Service) UNDER HONORABLE CONDITIONS (GENERAL). There were no other corrections made.

16. The applicant provides:

a. 24 pages of service records, dated 14 August 2000 to 27 May 2005, which are primarily summarized, in pertinent part, in the Record of Proceedings (ROP) above. Additional records include:

(1) Three DA Forms 4980-18 (Army Achievement Medal Certificates), dated 17 April 2001 to 29 April 2023, one DA Form 4980-14 (Army Commendation Medal Certificate, dated 3 May 2003, and orders announcing her award of the Driver's Badge (Wheeled), on 1 May 2002.

(2) A DA Form 1059, dated 14 April 2004, which shows she exceeded course standards, was placed on the Commandant's List for academic achievement, and received the Iron Soldier award for her performance on the Army Physical Fitness Test while attending the Primary Leadership Development Course.

(3) An NCOER, dated 3 January 2005, shows the applicant's overall performance as Launcher Section Crew Chief, for the period July 2004 thru November 2004, was successful. Her senior rater deemed her overall potential as superior. Further commenting that she would excel in any position in the U.S. Army, and she demonstrated outstanding performance as a truly dedicated noncommissioned officer.

b. An administrative Decision from the VA, dated 12 March 2013, shows the VA determined the applicant's service from 30 August 2000 to 27 May 2005 was honorable and was not a bar to VA benefits. Pertinent reasons noted are as follows:

(1) Statements indicate the sexual act(s) were consensual and neither coercion or disparate rank, grade, or status were involved. They were members of separate branches of the armed forces.

(2) [The applicant's] offenses during her service involved homosexual acts but had no aggravating circumstances as outlined under 38 CFR 3.12(d)(5). The acts occurred during a single incident and cannot be considered willful or persistent misconduct under the provisions of 38 CFR 3.12(d)(4). Although she accepted an undesirable discharge to escape trial by court-martial, it was a special court-martial, not a general court-martial as required under the provisions of 38 CFR 3.12(d)(1).

c. A VA Rating Decision, dated 28 July 2020, shows that the applicant was awarded service connection for PTSD with an evaluation of 70 percent (%).

17. Discharges under the provisions of Army Regulation 635-200, Chapter 10, are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

18. 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.

19. 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.

20. 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 and Service Boards for Correction of Military/Naval Records to follow when taking action on applications from former service members discharged under DADT or prior policies.

21. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the misconduct leading to the applicant's separation involving inappropriate sexual public contact and not specific homosexual acts, as well as the previous decision to upgrade by the ADRB, the Board concluded there was sufficient evidence to grant clemency by changing the narrative reason for separation reflected on the applicant's DD Form 214, for the period ending 27 May 2005, to reflect "Misconduct". The Board also recommends changing the RE code to reflect "3".

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214 showing:

- Characterization of Service: No change
- Separation Authority: No change
- Separation Code: GKN
- Reentry Code: 3
- Narrative Reason for Separation: Misconduct (Minor)

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of her discharge.

3/31/2025

X

CHAIRPERSON

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 Army Board for Correction of Military Records (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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal

agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

3. Title 38 of the Code of Federal Regulations contains all current regulations codified by the Department of Veterans Affairs (VA) pertaining to pensions, bonuses, and Veterans' relief. Section 3.12 provides for VA benefits eligibility based upon character of discharge.

4. Army Regulation 635-5 (Separation Documents), in effect at the time, prescribed the separation documents that must be prepared for Soldiers at the time of retirement, discharge, or release from active duty service or control of the Active Army. It established standardized policy for preparing and distributing the DD Form 214.

a. In pertinent part, the regulation states the DD Form 214 is a synopsis of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of active Army service at the time of release from active duty retirement or discharge.

b. The regulations provides for an additional entry on the DD Form 214 for continuous honorable active service when a Soldier who previously reenlisted without being issued a DD Form 214 was discharged with any characterization of service except honorable.

5. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an

honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

d. 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.

6. 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.

7. 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.

8. 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, United States Code, 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.

9. 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

10. 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//