

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2025

DOCKET NUMBER: AR20240004594

APPLICANT REQUESTS: reconsideration of her previous request for an upgrade of her under other than honorable conditions (UOTHC) character of service; and correction of her DD Form 214 (Certificate of Release or Discharge from Active Duty) to show:

- Item 26 (Separation Code) - JFF
- Item 27 (Reenlistment Code) - RE-1
- Item 28 (Narrative Reason for Separation) - Secretarial Authority

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

- DD Form 149 (Application for Correction of Military Record)
- Agreement to Engage an Attorney, The Veterans Consortium, dated 19 April 2024
- Request to Expedite, The Veterans Consortium, dated 23 April 2024
- memorandum, Under Secretary of Defense, Clifford L. Stanley, dated 28 January 2011
- memorandum, Under Secretary of Defense, dated 22 July 2011
- Don't Ask Don't Tell (DADT) Repeal Guidance
- Revised and New Guidance Based Upon Repeal of title 10, U.S. Code (USC), Section 654, DADT
- letter, National Personnel Records Center (NPRC), dated 5 April 2024
- Army Service Records (65 pages), dated 3 April 1987 to 3 August 1988
- Army Board for Correction of Military Records (ABCMR), Docket Number AR20230000175, Record of Proceedings (ROP), dated 26 July 2023 and corresponding decision letter, dated 2 August 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20230000175 on 26 July 2023.
2. The applicant states she was unjustly discharged in the pre-DADT era. There was no other misconduct. She was denied an upgrade last year because she only argued

clemency, not the repeal of DADT. She has suffered the repercussions of a “bad discharge” for 36 years. The misconduct which led to her discharge is no longer considered a crime under the Uniform Code of Military Justice.

3. Counsel states the applicant’s request for relief is based upon the repeal of DADT. In light of the Department of Defense Special Review Program for cases such as this, the decision should be expedited. In addition to an upgraded character of service, and corrected narrative reason, separation program designator (SPD) code, and reenlistment code; the applicant’s separation date should be adjusted to provide constructive active duty credit for the remaining period of service, or at a minimum two years of service, that was unjustly terminated due to the pre-DADT policy at the time of the applicant’s discharge. Her promising military career was ended early due to DADT.

4. The applicant enlisted in the Regular Army on 25 August 1987. Upon completion of initial entry training, she was awarded military occupational specialty 95B (Military Police). The highest rank she attained was private/E-2.

5. Court-martial charges were preferred against the applicant on 20 June 1988 for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows the applicant was charged with two specifications of sodomy, on divers occasions between on or about February 1988 and May 1988; and wrongfully committing an indecent act with Private/E-2 K.E.L., in the presence of another Soldier, on or about 12 May 1988.

6. The applicant was notified on 21 June 1988 of her commander’s intent to disqualify her from the Personnel Reliability Program (PRP). The commander stated she no longer felt the applicant was qualified to perform her PRP duties after the applicant demonstrated a characteristic or aberrant behavior which was prejudicial to the reliable performance of nuclear duties. The applicant acknowledged receipt of the notification on 23 June 1988 and elected not to make a statement refuting the reasons for her disqualification.

7. The commander subsequently recommended the applicant’s disqualification from the PRP program. As the specific reason the commander stated the applicant was investigated and charged with participating in a “Lesbian affair.” The disqualification was finally approved on 7 July 1988.

8. The applicant consulted with legal counsel.

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 UOTHC discharge, and the procedures and rights that were available to her.

b. After receiving legal counsel, she voluntarily requested discharge, for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), 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.

9. On 6 July 1988, the separation authority approved the recommended discharge and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate) and reduction to the lowest enlisted grade.

10. The applicant underwent a medical examination on 22 July 1988. A Standard Form 88 (Report of Medical Examination) shows no record of a significant medical history, and the examining provider medically cleared her for separation.

11. On that same date, the applicant underwent a mental status evaluation. The evaluating provider noted the applicant had the mental capacity to understand and participate in proceedings.

12. The applicant was discharged on 3 August 1988, under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service - in lieu of court-martial. Her DD Form 214 shows her character of service was UOTHC, with separation code KFS and reenlistment code RE-3, 3C. She was credited with 11 months and 9 days of net active service. She was awarded or authorized the following:

- Army Service Ribbon
- Expert Marksmanship Qualification Badge with Grenade bar
- Marksman Marksmanship Qualification Badge with Rifle bar (M-16)
- Marksman Marksmanship Qualification Badge with Pistol bar (.9mm)

13. On 26 July 2023, the ABCMR considered the applicant's request for an upgrade of her UOTHC character of service. After careful consideration, the Board determined there was insufficient evidence of in-service mitigating factors for the applicant's misconduct to weigh a clemency determination. The Board denied her request for relief.

14. The applicant's record includes correspondence between the applicant, the office of a U.S. Senator, and the Army Review Boards Agency regarding the status of the applicant's case.

15. The applicant provides the following:

a. DADT Repeal guidance to include two memorandums from the Under Secretary of Defense, [REDACTED] dated 28 January 2011 and 22 July 2011.

b. A letter from NPRC, dated 5 April 2024, in response to the applicant's request for records, and 65 pages of service records, dated 3 April 1987 to 3 August 1988, which are summarized, in pertinent part, in the ROP above.

c. A copy of ABCMR Docket Number AR20230000175, ROP, dated 26 July 2023 and corresponding decision letter, dated 2 August 2023, show that the applicant's previous request for an upgrade of her UOTHC character of service was based upon the contentions that she is a loyal, dedicated, and highly respected person. She was humiliated and traumatized by her experience in the Army, which left her in a deep state of depression.

15. 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.

16. The 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, U.S. Code, 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.

19. 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, 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 acts. The Board found no error or injustice in the 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 narrative reason for separation and corresponding codes is appropriate.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:XXX	:XXX	:XXX	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 reissuing the applicant a DD Form 214 showing:

- Characterization of Service: Honorable
- Separation Authority: AR 635-200
- Separation Code: JFF
- Reentry Code: 1
- Narrative Reason for Separation: Secretarial Authority

//SIGNED//

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. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

2. 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. 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.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), 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.

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, U.S. Code, 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, U. S. 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.

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, 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//