

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 October 2024

DOCKET NUMBER: AR20240004795

APPLICANT REQUESTS:

- an upgrade of his general, under honorable conditions discharge to honorable.
- remove narrative reason for separation.
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 the narrative statement on the DD Form 214 makes him feel uncomfortable and embarrassed, when he wants to use his VA benefits. He feels this is an injustice statement it should be taken off of his DD Form 214. He feels that his under honorable conditions discharge should be change to honorable because his actions while in the army were not unjust.
3. The applicant provides the listed document to be referenced in the service record, DD Form 214.
4. A review of the applicant's service record shows:
  - a. He enlisted in the Regular Army on 6 May 1980.
  - b. A Report of Unfavorable Information or Suspension of Access form dated 21 January 1982 shows, in item 11, on 19 January 1982, the applicant in a sworn

statement admitted to homosexual acts with civilians. The applicant admits to his engaging in a continuing lover's relationship with one of those males at the present time. The applicant has been disenrolled from language training pending consideration for separation due to a mission of homosexuality. It was highly recommended that the applicant's security clearance be revoked immediately. The applicant was being referred to community mental health activity for psychological evaluation.

c. The service record includes the applicant's medical examination, dated 21 January 1982, for the purpose of administrative separation which indicated he was generally in good health. The applicant was marked qualified for service and separation.

- Standard Form (SF) 88 (Report of Medical Examination)
- SF 93 (Report of Medical History)

d. The service record includes the applicant underwent a psychiatric evaluation on 2 February 1982 which states:

- There was no evidence of mental disease, defect, or derangement significant to warrant medical disposition.
- At the time of evaluation, the applicant was found to be capable of distinguishing right from wrong and adhering to the right. The applicant was responsible for his own actions and posed the mental and emotional capability to understand and participate in board and other legal proceedings.
- It is believed that the applicant is not amenable to any form of punishment, retaining, or other forms of rehabilitation what is the military service.
- The applicant is not motivated for further military service.
- The applicant is psychologically cleared for separation from the service under the provisions of appropriate administrative regulation.

e. On 9 February 1982, after waiving consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he is ineligible to apply for enlistment in the U.S. Army for a period of two years after discharge

f. On 11 February 1982, the immediate commander-initiated separation action against the applicant for homosexual conduct. He did not feel that rehabilitative

attempts are warranted in the applicant's case. The applicant expressed his desire to be discharged. The intermediate recommended approval.

g. On 9 March 1982, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for separation under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 15-9d (2), for homosexual conduct. He would be issued a General Discharge Certificate with separation code of JKC.

h. On 18 March 1982, he was discharged from active duty with a general, under honorable conditions characterization of service. His DD Form 214 shows he completed 1 year, 10 months, and 13 days of active service with no lost time. He was assigned separation code JKC and the narrative reason for separation listed as "Misconduct – Engage Attempted to Engage in or Solicited Another to Engage in Homosexual Acts)," with reentry code 3. It also shows he was awarded or authorized:

- Expert Marksmanship Qualification Badge with Rifle (M16)
- Sharpshooter Marksmanship Qualification Badge with Hand Grenade

i. The record is void of the notification of separation and the applicant's acknowledgment.

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

6. The Under Secretary of Defense (Personnel and Readiness) memorandum issued on 20 September 2011 states 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. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

10. 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:

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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition and available military records, the Board determined the applicant was serving honorably until he was separated after a fellow servicemember reported consensual homosexual conduct with the applicant. With the circumstances discussed in this case, the Board agreed it is equitable to correct the applicant's characterization of service, narrative reason, 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 18 March 1982 showing in:

- item 24 (Characterization of Service): Honorable
- 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



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, 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 (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.

3. Army Regulation 635-5 (Separation Documents, in effect at the time, states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

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 "JKC" was the correct code for Soldiers separating under chapter 15 for homosexuality Act.

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 FSMs 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. 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//