

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 August 2024

DOCKET NUMBER: AR20240005498

APPLICANT REQUESTS: upgrade of her general discharge to honorable.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 discharge should change to honorable. The applicant marked "Disability," "PTSD (post-traumatic stress disorder)," and "DADT (Don't Ask, Don't Tell)." She also added that she was wrongfully detained and removed from home. She was taken to a mental health facility by [illegible word]. She experienced a lot of homelessness and also disturbed by [illegible word].
3. The applicant enlisted in the Regular Army on 20 July 2006. She completed basic combat training at Fort Leonard Wood, MO and was assigned to Fort Huachuca, AZ for military occupational specialty training.
 - a. On 29 March 2007, an investigating officer was appointed under Army Regulation (AR) 15-6 (Procedures for Administrative Investigations and Boards of Officers) to investigate allegations of homosexual conduct among Soldiers in [Unit's Name].
 - b. On 6 April 2007, the IO rendered his findings and stated:
 - (1) He (the IO) was appointed as the Investigating Officer specifically to ascertain whether [Applicant] engaged in homosexual conduct as defined by Chapter 15 of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations). He was initially informed that [Applicant] potentially engaged in homosexual conduct by engaging in open sexual behavior in the barracks bays where she was stationed. After

receiving these orders, he explored the context of the alleged acts and gave [Applicant] an opportunity to clarify matters on her behalf.

(2) The investigation concluded on 6 April 2007. It consisted of approximately 16 interviews, as well as an interview with the subject, which she provided after being advised of the homosexual conduct policy, the presumptions applicable to homosexual conduct, and after waiving her rights pursuant to UCMJ., Article 31(b), as reflected in the attached exhibits. On the basis of the investigation, the IO determined that there exists a basis for separation from the Army for engaging in homosexual conduct.

(3) The IO's reasons for this finding include the following factors: [Name of Soldier] admitted in a sworn statement available that she and [Applicant] had "engaged in sex". She expanded that she and [Applicant] had laid together in the same bunk, kissed on the mouth, open mouthed, cuddled in bed, kissed on the neck breasts and genitals. She admitted to penetrating [Applicant's] vag**a with her finger, and willingly consented when [Applicant] did these same acts to her, with no exceptions. Pursuant to AR 635-200, paragraph 15-2a, AR 600-20, paragraph 4-19a(3)(a), such acts constitute homosexual conduct and form a basis for separation.

c. On 2 May 2007, the applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice, in that she:

- did, near Fort Huachuca, AZ, on or about March 2007 and April 2007, commit sodomy with Private GTB
- did at or near Fort Huachuca, AZ, between on or about March 2007 and April 2007, disturb the public tranquility by moaning and groaning while having intimate physical contact with Private GTB after 'lights out,' after being asked by other soldiers to stop as to allow them to sleep, such disorder being prejudicial to good order and discipline in the armed forces.
- did at or near Fort Huachuca, AZ, between on or about March 2007 and April 2007, while at the [Unit's Name], Open Bay Barracks willfully and wrongfully expose in an indecent matter to public view her naked body while having intimate physical contact with Private GTB
- did at or near Fort Huachuca, AZ, between on or about March 2007 and April 2007, wrongfully commit an indecent act with Private GTB by placing her finger into Private GTB's vag**a while in the Open Bay Barracks area.

Her punishment consisted of reduction from private first class/E-3 to the grade of private (E1); forfeiture of \$650.00 pay per month for two months, extra duty and restriction for 45 days.

d. On 15 May 2007, the applicant's immediate commander notified the applicant of her intent to initiate separation action against the applicant in accordance with chapter 15, paragraph 15-2 of AR 635-200 for Homosexual Conduct. The reason for the proposed action: for engaging in, attempting to engage in, or soliciting another person to engage in a homosexual act or acts. The reasons for the proposed action are: The applicant admitted to being a homosexual and her desire to commit homosexual acts. The commander advised the applicant of her rights and recommended a general discharge.

e. On 16 May 2007, the applicant acknowledged receipt of the commander's notification and subsequently consulted with legal counsel. She was advised of the bases for the contemplated separation action for homosexuality, the type of discharge she could receive and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights that were available to her. She acknowledged.

(1) Prior to completing this form, she was afforded the opportunity to consult with consulting counsel and to consider whether or not to submit a conditional waiver.

(2) She is hereby voluntarily waiving consideration of her case by an administrative separation board contingent upon her receiving a characterization of service or description of separation no less favorable than honorable.

(3) Statements in her own behalf are not submitted herewith.

(4) She is making this request of her own free will and had not been subjected to any coercion whatsoever by any person.

(5) She understood that she may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to her. She further understood that, as the result of issuance of a discharge under other than honorable conditions, she may be ineligible for many or all benefits as a veteran under both Federal and State laws and that she may expect to encounter substantial prejudice in civilian life.

f. After this acknowledgement and election of rights, her immediate commander, initiated separation action against her in accordance with AR 635-200 by reason of homosexuality. The intermediate commander recommended approval of the discharge action with the issuance of an honorable discharge.

g. The applicant underwent a mental status evaluation and a medical examination. She was found mentally fit for administrative separation. She was also found medically qualified for separation. The mental status evaluation states:

- There is no evidence of mental defect, emotional illness, or psychiatric disorder of sufficient severity to warrant disposition through medical channels.
- This individual is mentally responsible for her behavior and possesses sufficient mental capacity to understand and participate in any administrative or judicial proceedings in which she is involved.
- This individual is cleared for any administrative action deemed appropriate by the commander.

h. Following a legal review for legal sufficiency, the separation authority approved the applicant's discharge under the provisions of chapter 15 of AR 635-200 by reason of homosexuality with the issuance of a General Discharge Certificate.

i. Accordingly, the applicant was discharged on 23 May 2007. The DD Form 214 (Certificate of Release or Discharge from Active Duty) she was issued shows she was discharged under the provisions of chapter 15-3B of AR 635-200 due to Homosexual Conduct (Admission) with a general, under Honorable conditions characterization of service. She completed 10 months and 4 days of active service. Her DD Form 214 shows in:

- Block 24 (Character of Service): General, Under Honorable Conditions
- Block 25 (Separation Authority): AR 635-200, Paragraph 15-3B
- Block 26 (Separation Code) JRB
- Block 27 (Reentry Code) 4
- Block 28 (Narrative Reason for Separation) Homosexual Conduct (Admission)

4. On 4 March 2015, the Army Discharge Review Board (ADRB) notified the applicant that after carefully examining the applicant's record of service during the period of enlistment under review and notwithstanding the examiner's Discussion and Recommendation that follows, the ADRB determined the applicant's characterization of service was proper and equitable and voted not to change it. However, the Board found the narrative reason for the applicant's discharge is now inequitable based on the current standard. The evidence of record shows the applicant admitted to being a homosexual and she desires to commit homosexual acts without any aggravating factors as defined in AR 635-200 in effect at the time. She was discharged for engaging in or soliciting another person to engage in a homosexual act or acts. Accordingly, the ADRB voted to grant relief in the form of a change to the narrative reason of the applicant's discharge to "Secretarial Authority," under the provisions of Chapter 5, paragraph 5-3, AR 635-200, with a corresponding Separation Program Designator (SPD) Code of "JFF," and a reentry code (RE) of "3."

5. Accordingly, the applicant's DD Form 214 was voided. She was reissued a new DD Form 214 that shows she was discharged on 23 May 2007. The reissued

DD Form 214 she was issued shows in:

- Block 24 (Character of Service): General, Under Honorable Conditions
- Block 25 (Separation Authority): AR 635-200, Chapter 5-3
- Block 26 (Separation Code) JFF
- Block 27 (Reentry Code) 3
- Block 28 (Narrative Reason for Separation) Separation Authority

6. By regulation (AR 635-200), 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. However, 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. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of her general discharge to honorable. She marked disability, PTSD, and DADT (Don't Ask Don't Tell) were related to her discharge. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 20 July 2006; 2) The applicant was discharged on 23 May 2007, Chapter 15-3B due to Homosexual Conduct (Admission) with a general, under Honorable conditions characterization of service. She completed 10 months and 4 days of active service; 3) On 4 March 2015, the ADRB reviewed and determined the applicant's characterization of service was proper and equitable and voted not to change it. However, the Board found the narrative reason for the applicant's discharge is now inequitable based on the current standard. Accordingly, the ADRB voted to grant relief in the form of a change to the narrative reason of the applicant's discharge to "Secretarial Authority," under the provisions of Chapter 5, paragraph 5-3, AR 635-200, with a corresponding Separation Program Designator (SPD) Code of "JFF," and a reentry code (RE) of "3."

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's

Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided.

c. The applicant asserts she incurred a psychiatric disability, specifically PTSD, while she was on active service, which warrants a referral to IDES and medical discharge. In addition, she reported issues related to DADT were related to her discharge. There is clear evidence the applicant was discharged for homosexual behavior during the period of DADT. The ADRB did change the narrative reason for her discharge, but they did not upgrade her discharge. She was initially seen at behavioral health services on 02 November 2006. She was reporting stress related to family issues and problems sleeping. She was motivated to engage in treatment and remain in the Army. She was referred to Stress Management Classes and diagnosed with Adjustment Disorder with Anxious Mood. The applicant attended classes, and she reported improvement with no interference with her training. Her case was closed at behavioral health on 14 December 2006. She was seen for a Mental Status exam as part of her administrative separation on 13 April 2007. She was not diagnosed with a mental health condition, found to meet the retention requirements of Chapter 3, AR 40-501, and was cleared for any administrative action deemed appropriate by command.

d. A review of JLV provided evidence the applicant had one encounter with the VA in February 2024. She was not diagnosed with a service-connected mental health condition. However, she stated she filled out a questionnaire for PTSD for a provider, who prescribes marijuana, and she stated she met criteria for PTSD. She also reported a history of inpatient and outpatient behavioral health treatment after her discharge. However, the specific timeframe or relative mental health conditions were not provided. The applicant has not been awarded any service-connected disability at this time.

e. Based on the available information, it is the opinion of the Agency BH Advisor that the applicant was diagnosed with a short-term adjustment disorder, while on active service which was unrelated to her reason of discharge. She was discharged for homosexual behavior, and only her narrative reason of separation has been changed. There was evidence the applicant was performing adequately while on active service. However, there is insufficient evidence the applicant was ever placed on a psychiatric profile while on active service, required inpatient psychiatric treatment, or was found to not meet retention medical standards from a psychiatric perspective. Therefore, there is insufficient evidence the applicant was experiencing a mitigating mental health condition including PTSD at the time of her active service. Thus, there is insufficient evidence her case warrants a referral to IDES to assess her suitability for a medical discharge at this time.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? No, the applicant was diagnosed with a short-term adjustment disorder, while on active service which was unrelated to her reason of discharge. She was discharged for homosexual behavior, and only her narrative reason of separation has been changed. There was evidence the applicant was performing adequately while on active service. However, there is insufficient evidence the applicant was ever placed on a psychiatric profile while on active service, required inpatient psychiatric treatment, or was found to not meet retention medical standards from a psychiatric perspective. Therefore, there is insufficient evidence the applicant was experiencing a mitigating mental health condition including PTSD at the time of her active service. Thus, there is insufficient evidence her case warrants a referral to IDCS to assess her suitability for a medical discharge at this time.

(2) Did the condition exist or experience occur during military service? N/A.

(3) Does the condition experience actually excuse or mitigate the misconduct? N/A.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, 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 and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of her characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence the applicant's case warrants a referral to IDCS to assess her suitability for a medical discharge at this time. The opine noted there is insufficient evidence the applicant was experiencing a mitigating mental health condition including PTSD at the time of her active service.

2. The Board determined there is insufficient evidence of in-service mitigating factors to support the applicant's contentions for an upgrade of her characterization of service. The Board found the applicant's disrespect for her peers in an open bay environment during her sexual encounters was unacceptable. The Board determined her character of service is appropriate based on her actions with her partner. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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.

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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, 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.
 - a. Paragraph 3-7a, 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. Paragraph 3-7b, 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 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. Section 1556 of Title 10, United States Code, 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//