

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 March 2025

DOCKET NUMBER: AR20240005784

APPLICANT REQUESTS: correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show:

- an upgrade of his under other than honorable conditions discharge to honorable
- an upgrade of his narrative reason for separation with respective separation code
- a change in his reenlistment (RE) code
- reinstatement to the rank of specialist (SPC), E-4

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

- DD Form 149 (Application for Correction of Military Record)
- Brief of Counsel

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. Counsel requests, on behalf of the applicant, an upgrade of his, under other than honorable conditions discharge to honorable, a change in the narrative reason for separation to reflect "Secretarial Authority," with respective separation code to JFF, a change in the reentry code to RE-1J, and reinstatement of rank to SPC. Counsel's full brief is available for review by the Board and states in part:

a. The applicant's performance record was flawless, and he was a promising Soldier moving up the ranks until he was targeted for being gay. To strengthen their case, his report of being sexually assaulted was reversed to indicate he was the perpetrator. Since that time, the Department of Defense has recognized the harmful effects of the military's discriminatory policies and has acknowledged that homosexual conduct or admission is not grounds for discharge.

b. He served with no misconduct or disciplinary issues from 29 December 1977

through 7 November 1980. He received numerous letters of commendation, appreciation, and recommendations for promotion. The “serious misconduct” cited in his recommendation for discharge, is no longer misconduct under the Uniform Code of Military Justice today. With the repeal of “Don’t Ask, Don’t Tell” on 20 September 2011, the United States military ceased its longstanding policy of separating service members based solely on their actual or perceived homosexual conduct. The applicant suffered a grave injustice when a policy later found to be erroneous was the sole reason for his discharge.

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

a. He enlisted in the Regular Army on 29 December 1977.

b. His DA Form 2-1 (Personnel Qualification Record) shows he served in Germany from 30 May 1978 through his discharge. It also lists his promotions as follows:

- private, E-1 – 29 December 1977
- private, E-2 – 2 June 1978
- private first class, E-3 – 29 December 1978
- specialist, E-4 – 1 December 1979

c. On 21 August 1980, the applicant’s immediate commander notified him of his intent to separate him under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-33 (3) for misconduct due to sexual perversion. He acknowledged receipt of the notification on the same day. The applicant’s rank was listed as SPC.

d. On 26 August 1980, after consulting 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

e. On 29 August 1980, the applicant underwent a mental evaluation. The DA Form 3822-R (Report of Mental Status Evaluations) shows he had the mental capacity to understand and participate in Board proceedings.

f. On 29 August 1980, the applicant underwent a medical evaluation for the purpose of separation which indicated he was generally in good health. He was subsequently marked qualified for service, to include separation/chapter.

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

g. On 12 September 1980, the immediate commander-initiated separation action against the applicant for homosexual acts. He recommended waiver of the requirements in paragraph 13-6 and 13-7 of AR 635-200 which states a member's behavior has been such that continued behavior of a similar nature may warrant action against him. If the applicant was retained on active duty, it would create serious disciplinary problems or a hazard to the military mission. The intermediate command recommended approval.

h. On 31 October 1980, consistent with the intermediate commander's recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14-33a (3) acts of misconduct for homosexual acts. He would be issued an Under Other Than Honorable Conditions Discharge Certificate.

i. Orders 262-5 dated 4 November 1980 discharged the applicant from active duty with an effective date of 13 November 1980. His rank was listed as specialist.

j. On 7 November 1980, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 year, 10 months, and 9 days of active service. He was assigned separation code JKC and the narrative reason for separation listed as "Misconduct – Homosexual Acts," with reenlistment code 4. It also shows he was awarded or authorized:

- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
- Expert Marksmanship Qualification Badge with Hand Grenade Bar

4. On 11 December 1981 and 5 November 1985, the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his requests for an upgrade of his discharge.

5. Under Secretary of Defense (Personnel and Readiness) memorandum states that, effective 20 September 2011, 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

6. 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

7. 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. By regulation (AR 635-200), in effect at the time, action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

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.

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 relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the FSM's DD Form 214 to show:

- item 4a (Grade, Rate or Rank): SPC
- item 4b (Pay Grade): E4
- item 24 (Character of Service): Honorable
- item 25 (Separation Authority): Army Regulation 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

X //SIGNED//

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, 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 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. 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.
3. 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 1-13 (1) (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

b. Paragraph 1-13 (b) (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. Paragraph 1-13 (c) (Under Other than Honorable Conditions) a discharge under other than honorable condition is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, for homosexuality, for security reasons, or for the good of the service (see para 1-17, issuance of an under other than honorable conditions discharge)

d. Paragraph 14-16 (b) (Authority for discharge or retention) states upon determination that a member is to be separated with a discharge certificate under other than honorable conditions, the convening authority will direct reduction to the lowest enlisted grade by the reduction authority under the provisions of AR 600-200 (Personnel – General Enlisted Personnel Management System).

e. Paragraph 14-33 (Other Misconduct) states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

4. Army Regulation 635-5-1 (Separation Program Designators (SPD)) 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 paragraph 14-33 for misconduct – homosexual acts and/or moral or professional dereliction.

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 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.

10. 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.

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 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.

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//