

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-090

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FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on April 24, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 26, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant alleged that he is the veteran whose name appears below his name in the case caption above. The veteran enlisted in the Coast Guard on October 13, 1986, and was honorably discharged from the Coast Guard due to a physical disability (a knee impairment) two years later, on October 27, 1988. The veteran's military records, which include a birth certificate, show that the veteran was born female and served in the Coast Guard with a female name.¹ The applicant alleged that he is the veteran and that State courts have legally changed his gender to male and his name to the male name shown in the case caption. The applicant asked the Board to correct his military records to reflect his new male name and male gender. He specifically asked to be issued a new discharge form, DD 214, with his new name. (DD 214s do not include a notation of gender.)

In support of his allegations regarding his identity and name, the applicant submitted photocopies of two State court orders. The first, dated October 25, 1995, changes the veteran's original first name from a female name to a male name; drops the middle name; and does not

¹ The Board notes that persons' names are considered "male" or "female" (or both) because of cultural tradition, not law. This decision labels the names at issue "male" or "female" in accordance with American cultural tradition.

change the last name. The second, dated August 16, 2005, changes the veteran's first name to another male name and also changes his last name.

In support of his allegations regarding his gender change, the applicant submitted a photocopy of a notarized letter dated June 27, 2006, from a doctor specializing in plastic and reconstructive surgery, who stated that psychological testing had determined that the applicant's "true gender" is male and that the applicant underwent surgical procedures on June 5, 2006, "to irreversibly alter his anatomy and appearance to that of male." The applicant also submitted a photocopy of a third court order, dated December 5, 2006, which states that the "gender of the petitioner [the applicant] has been changed ... from female to male." The court also ordered the State to issue the applicant a new birth certificate reflecting his new gender.

The applicant also submitted a color photocopy of the first page of his United States passport, issued on July 19, 2007, which shows that his sex is male. None of the official documents submitted by the applicant show the veteran's (or any other) SSN. However, in support of his prior case, BCMR Docket No. 2009-060, the applicant submitted a photocopy of his new birth certificate, issued on March 8, 2007, which includes the same date, time, and hospital of birth and the same parents' names, ages, and places of birth as appear on the veteran's Coast Guard enlistment documents and on the birth certificate in the veterans' military record. Moreover, it was a single birth (without a twin).

VIEWS OF THE COAST GUARD

On September 16, 2015, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC), who recommended that the Board grant relief.

PSC stated that although the application is not timely, PSC recommends that the Board consider the case on the merits in the interest of justice. PSC stated that the applicant's DD 214 is not erroneous because under Chapter 1.D.2.a. of COMDTINST M1900.4D, the manual for preparing DD 214s, entries on a DD 214 are supposed to be accurate as of the date of discharge. However, PSC stated, when transgender veterans present their DD 214s to receive veterans' benefits or for employment purposes, they are potentially subject to discrimination because the DD 214 reveals their prior gender. Therefore, PSC recommended that the Board order the Coast Guard to issue the applicant a new DD 214 with his current name "in the interest of privacy and justice." PSC noted that this recommendation differs from prior Coast Guard recommendations and prior BCMR decisions in such cases but that relief is recommended especially in light of recent decisions granting such relief issued by the correction boards of the Army, Navy, and Air Force.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 7, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The Board received no response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552. The original application in BCMR Docket No. 2009-060 was timely under 10 U.S.C. § 1552(b) because it was filed within three years of the date the applicant completed, and hence discovered, his legal gender and name changes. Although requests for reconsideration are supposed to be filed within two years of the issuance of the original decision, the Board finds that it is in the interest of justice to consider this case on the merits because of the potential for injustice to the applicant and recent decisions granting relief in similar cases issued by the Army, Navy, and Air Force correction boards.

2. The applicant alleged that he is the veteran whose female name is shown in the case caption above and that his DD 214 is erroneous and unjust because it does not reflect his new name and gender. The BCMR is authorized to correct both errors and injustices in military records.² The term “injustice” as used in 10 U.S.C. § 1552(a) “do[es] not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ *need not have been caused by the service involved*” (emphasis added).³ Therefore, even when the Coast Guard has not caused the alleged error or injustice—as in this case—the Board may correct it nonetheless. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the veteran’s military record is correct, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”⁵

3. The applicant has submitted court decisions and old and new birth certificates, which show that he is the veteran whose name appears second in the caption above. In addition, his medical records, a court order changing his legal gender, and his new birth certificate show that he has changed his gender from female to male. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that he is the veteran whose name

² 10 U.S.C. § 1552(a).

³ 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907.

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

appears second in the caption above and that he has changed his legal name and gender since his discharge from the Coast Guard.

4. Until recently, the military correction boards generally refused to reissue DD 214s when veterans have changed their name and gender because their DD 214s were accurate when they were issued, as required by policy.⁶ In late 2014, the Army BCMR began directing the Army to reissue DD 214s for transgender applicants in their new names based on a finding that denying relief might prevent or delay these veterans from receiving benefits.⁷ The Navy and the Air Force have followed suit based on arguments of potential employment discrimination and potential denial or delay of veterans' benefits.⁸ Both the Navy and Air Force correction boards retain the old DD 214 and the decision of the board in the applicant's military record for historical purposes.⁹

5. Although Chapter 1.D.2.a. of COMDTINST M1900.4D requires DD 214s to be accurate as of the date of discharge, this rule may have an unjust impact on transgender veterans, whose prior gender is revealed when they present their DD 214s. The disclosure of their prior gender exposes them to potential prejudice in gaining employment and to potential delay in gaining benefits. The impact of the rule in COMDTINST M1900.4D on transgender veterans is potentially much more severe and intrusive than it is on veterans who change their names for other reasons, such as marriage or divorce.¹⁰ Moreover, courts have found that a person has a privacy interest in his or her gender history, which is considered an intimate and "excruciatingly private" matter.¹¹

6. Therefore, the Board finds that to protect the applicant's privacy and in the interest of justice, relief should be granted by directing the Coast Guard to issue him a new DD

⁶ Docket No. 20110019856 (Army BCMR, April 17, 2012); Docket No. 20060017156 (Army BCMR, July 10, 2007); Docket No. 20040007301 (Army BCMR, June 30, 2005); Docket No. 896-01 (Navy BCNR, April 6, 2001); Docket No. 7208-00 (Navy BCNR, May 21, 2001); Docket No. 1854-00 (Navy BCNR, June 7, 2001); Docket No. 99-00837 (Air Force BCMR, 1999); Docket No. 2000-151 (Coast Guard BCMR, May 17, 2001); Docket No. 2008-181 (Coast Guard BCMR, Feb. 26, 2009); *but see* Docket No. BC-2003-04051 (Air Force BCMR, 2004), in which the AFBCMR directed the issuance of a second DD 214 to a transgender retired veteran, finding that "the original DD Form 214 is a hindrance to the applicant should she be required to provide documents to a servicing facility for her needs, such as insurance companies, hospitals, places of employment, etc...[W]e are not inclined to provide this applicant with only an SOS [Statement of Service]. In our opinion, to do so would be arbitrary and capricious if the applicant is not also provided an additional DD Form 214, reflecting her current name and verifying military service."

⁷ *See, e.g.*, Army BCMR Docket Nos. 20140003251, 20140021645, 20140001946.

⁸ *See, e.g.*, AFBCMR Docket No. BC-2014-01340; Asst. Secretary of the Navy for Manpower & Reserve Affairs, BCNR FAQs, at http://www.secnnav.navy.mil/mra/bcncr/Pages/FAQ_and_Key_Information.aspx#1.

⁹ *Id.*; AFBCMR Docket No. BC-2003-04051.

¹⁰ The Board notes that although disparate impact analysis has been applied primarily in employment law cases for protected groups, following *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), by analogy, the legal reasoning in those decisions is applicable in this case.

¹¹ *Powell v. Schriver*, 175 F.3d 107, 112 (2nd Cir. 1999), *citing Whalen v. Roe*, 429 U.S. 589, 600 (1977) (*citing Griswold v. Connecticut*, 373 U.S. 473 (1963), and *Roe v. Wade*, 410 U.S. 113 (1973)).

214 in his new name with no reference to his original name. His prior DD 214 should be retained in his record with a copy of this decision to explain why the name on his new DD 214 does not match the name on all his other military records.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [REDACTED] USCG, now known as [REDACTED] for correction of his military record is granted. The Coast Guard shall issue him a new DD 214 in his current legal name, [REDACTED]. The Coast Guard shall also retain a copy of this decision with his old DD 214 in his military records.

February 26, 2016

