



7 February 2011

The Honorable Robert M. Gates
Secretary of Defense
United States Department of Defense
1400 Defense Pentagon
Washington, DC 20301

The Honorable Dr. Clifford L. Stanley
Under Secretary of Defense for Personnel and Readiness
United States Department of Defense
1400 Defense Pentagon
Washington, DC 20301

Dear Secretary Gates and Dr. Stanley:

Since SLDN's inception in 1993, we have responded to over 10,000 requests for assistance from service members, their families and other concerned citizens. In the few weeks since President Obama signed legislation allowing for the full repeal of 10 U.S.C. § 654, the law known as "Don't Ask, Don't Tell" (DADT), our office has heard from hundreds of people who were discharged under the law and who want to know how repeal will affect them. From these detailed and ongoing conversations, two important issues have emerged; we write today to bring them to your attention.

Nearly every former service member we have spoken to wants to see his or her DD-214 (or other discharge paperwork) changed to remove the stain of their DADT discharge and their disqualification from military service. A government certification of one's unfitness for service and sexual orientation can have lasting effects, and these service members want the remnants of the abandoned policy removed from their discharge paperwork.

A significant percentage of these veterans would like to return to the service of their country. Some want to return to the exact positions they were forced to leave. Many would like to return to active duty, but in a different branch or different capacity. Others hope to serve in a Reserve component or National Guard unit in their community. The issues surrounding these requests for reentry can be complicated. They hinge not only on notions of justice and equity, but also on the realities of age, training and credit for time served, to name a few.

Based on the conversations we have had, we expect that the armed services will receive thousands of requests of these types soon after repeal is effective. In order to ensure the uniformity and fairness that Americans expect from the armed forces, the services will need to engage in fact-specific inquiries to determine the proper remedy for each former service member. In which ways does a service member's discharge paperwork need to be changed; at what grade should the service member be reinstated in the military? Individual examinations are the only way to make proper and satisfactory paperwork and reentry determinations. Without that degree of consideration, the unaddressed injustice may lead many to consider redress in other fora.



Discharge Paperwork

For service members discharged under DADT, there are potentially three troubling notations on their DD-214 forms. These notations exist solely because of DADT, and as the military abandons this policy it needs to remove, to the extent possible, the harm left over from its enforcement.

Negative Reentry Code

The Negative Reentry Code (generally an RE-4 Code) that accompanies a DADT discharge can harm former service members, even those who do not wish to rejoin the military. Many employers, especially in the law enforcement and security fields, will not employ people who received RE-4 Codes. The reason, in general, makes sense: the military branches give RE-4 Codes only to those people who should never be allowed to rejoin. This can be for medical reasons or psychological reasons, but often is for misconduct related to drugs and alcohol. In the context of DADT, however, most people would be qualified to serve again at the time they were forced out of the service. Although the guidance issued on January 28, 2011 directs the services to waive the code for those who wish to re-enter, a waiver does not assist those veterans who do not wish to rejoin the military. There should be an easy mechanism made available for them to get this code changed.

Narrative Reason for Separation and Separation Code

Service members who are discharged under DADT receive a Narrative Reason for Separation (and a corresponding Separation Code) that indicates to anyone who sees the form exactly why that service member was separated. When the Narrative Reason is “Homosexual Conduct – Admission,” “Homosexual Act” or “Homosexual Marriage,” a former service member is compelled to be immediately “out” to every future civilian employer and anyone else who sees the document. This “government certification” of one’s sexual orientation lasts forever and can subject the former service member to discrimination in civilian life.

Discharge Characterization

When service members are discharged from the military, their Discharge Characterization should reflect the character of their service. For those discharged under DADT, this is not always the case. Undeserved Other Than Honorable discharges can unfairly harm former service members for the rest of their lives.

Service members who are discharged under DADT generally receive an Honorable or General Under Honorable Conditions discharge based on their service records. However, a service member discharged for a “Homosexual Act” that involved a so-called “aggravating factor” may be given an Other Than Honorable (OTH) discharge characterization. Most of the factors on the list (such as acts involving minors, prostitutes, or coercion) constitute unacceptable behavior and should result in an OTH. But there are two “aggravating factors” that do not inherently constitute misconduct and that should not necessarily result in OTH discharges. These are acts committed openly in public view (*e.g.*, holding hands at a restaurant) and acts committed on base or on post (*e.g.*, a quick hug while being dropped off). Obviously overt sexual acts committed in public or on base should not be tolerated, and service members should remain accountable to regulations regarding public displays of affection. But the term “Acts” under DADT has been defined so



broadly as to capture a number of service members who had Honorable service but who have been unjustly burdened with an OTH.¹

Addressing Discharge Paperwork Changes

The military currently has the authority and the mechanisms to alter discharge paperwork in a number of ways. Discharge Review Boards (DRBs) can “change a discharge or dismissal, or issue a new discharge”² based on “propriety and equity.”³ This includes taking into account current regulations and deeming a discharge inequitable if policies and procedures “under which the applicant was discharged differ in material respects from those currently applicable on a Service-wide basis” and if the “current policies or procedures represent a substantial enhancement of the rights afforded” to the applicant.⁴ DRBs are open to any service member who files an application for review within 15 years of being discharged.

Similarly, the Boards of Correction for Military Records (BCMR)⁵ can make corrections to any military record when it is necessary to “correct an error or remove an injustice.”⁶ A service member has three years from the time he or she discovers the injustice to make an application for relief to the appropriate BCMR. After that time, the Board has discretion to consider an application if it determines that doing so is “in the interest of justice.”⁷

Based on our discussions with veterans, we would expect that a high percentage of the more than 14,000 service members discharged under DADT since 1993 will want their discharge paperwork changed in some way. That is to say nothing of all the service members discharged under the prior regulatory ban. In order to adequately address the influx of requests for corrections in a timely manner, we recommend that you direct the service secretaries to exercise their authority under 10 U.S.C. § 1558 to establish a “special board” in each of the service branches.

Such Boards would allow those who staff them to gain a level of expertise in subject matter; centralization will ensure the uniformity that is required under Department of Defense Directive 1332.41. Diverting the influx of records change applications to a single body within each service will allow the regular DRBs and BCMRs to continue to comply with the timeliness requirements mandated by 10 U.S.C. § 1557. In short, establishing these Boards will allow for a more uniform, efficient, fair and expeditious outcome for all involved.

¹ In addition, the Navy and Marine Corps give those discharged for “marriage” or “attempted marriage” an OTH. In the Army and the Air Force, members discharged for same conduct receive Honorable or General Under Honorable Conditions discharges, based on their service record. Those Navy and Marine Corps OTHs should also be changed.

² 10 U.S.C. 1533(b).

³ Department of Defense Instruction 1332.28 E4.1 (April 4, 2004).

⁴ *Id.* at E4.3.1 – E4.3.1.1.

⁵ In this context, the term Board of Correction for Military Records (BCMR) is used as inclusive of the Board of Correction of Naval Records.

⁶ 10 U.S.C. § 1552(a)(1).

⁷ *Id.* at § 1552(b).



Re-accession

We are pleased that the Policy Guidance issued on January 28, 2011 indicated that the services will waive the negative re-entry codes that are based on discharges under DADT. That does not end the matter, however, for the former service members who wish to return to the military. Many will have a number of issues concerning age, training, specialty, credit for time served, etc. While we agree with the Policy Guidance that there should be “no preferential treatment” for these individuals, recognition should be given to the fact that they were separated involuntarily, had their service interrupted against their will and, absent DADT, might still be serving today. Case-by-case review and analysis will be required for each application.

We therefore recommend that the Special Boards described above also be authorized to provide for reinstatement, reentry or reappointment to specific payment grades of service members discharged under DADT. This would allow for the type of individualized assessment that each case requires and would take advantage of the expertise developed in the Special Boards to ensure consistent treatment of applicants.

Service members discharged under DADT who wish to re-join the armed services can pursue that goal through the courts. One service member has won reinstatement through that route (*Witt v. Dep't of the Air Force*) and others are seeking that relief now (*Almy v. Dep't of Defense*). It is in the interest of the armed services to encourage former service members discharged under DADT who want to re-join the military to apply through a Special Board process that takes their prior service and reason for discharge into account, rather than to engage in protracted and costly litigation that can only delay putting Don't Ask, Don't Tell behind us.

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The Special Boards we propose are the best way to deal with the issues of paperwork changes and applications for re-accession. The Boards would develop a high degree of expertise on the issues faced by former service members discharged under DADT and would handle them in the most efficient, uniform way. Based upon our conversations with former service members, we expect that the services will receive significant numbers of these requests as soon as the repeal of DADT is effective. In order to deal with these requests fairly, effectively, and efficiently, these Special Boards should be in place, staffed and trained, on the date of repeal.

We would be happy to discuss these matters further with you or your staffs.

Sincerely,

Aubrey Sarvis
Executive Director
Servicemembers Legal Defense Network

CC:

The Honorable Jeh Johnson
General Counsel
United States Department of Defense