

Changing the Name on a DD-214 for Transgender Veterans

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1. The DD-214

a. What is it?

When a veteran is discharged from the military, the most important discharge document they receive is the DD Form 214 “Certificate of release or Discharge from Active Duty,” commonly referred to as a “DD 214.” This document comes in a short form, which is edited to display only basic information, and a long form.

Both forms contain general information including the veteran’s name, dates of entry and discharge, total time in service, rank, decorations, and military education. Additionally, the long form includes the characterization of service (e.g. honorable, dishonorable, etc.), reason for discharge (e.g. completion of term of service, medical disability, etc.), re-enlistment code (indicating the circumstances under which the veteran can reenter the service), and a code matching the reason for discharge.

There is no gender marker on a DD 214.

b. Why is it important?

The DD 214 represents the complete, verified record of a veteran’s active military service, awards and medals, and other pertinent service information. The DD 214 is commonly required by federal and state government agencies, including the U.S. Department of Veterans Affairs, to provide various veterans’ benefits. The DD 214 is also crucial for a veteran to prove her or his record of service in connection with, among other things, applying for secondary educational opportunities or for employment in positions which have a preference for veteran candidates, applying for benefits for their dependents, and for accessing the same benefits they had while on active duty status (such as shopping on military installations or seeking treatment at a military health facility).

- c. What is the concern about a transgender veteran’s DD 214?
2. How are Military Records Changed or Corrected?
- a. What is the BMCR/BCNR?

- i. Purpose

Under federal law, the Secretary of each branch of the United States Armed Forces is empowered with broad authority to correct any military record if necessary to “correct an error” or to “remove an injustice.”¹ This law also allows each Secretary to establish a Board for Correction of Military Records (“BCMR”) (the Navy and Marine Corps have a Board for Correction of Naval Records (“BCNR”), and the applicable United States Department of Defense (“DoD”) instruction states that correction of DD Forms 214 is to be made by the applicable BCMR/BCNR.² These administrative bodies review applications for amendment of military records and each BCMR/BCNR is governed by its service branch’s own internal guidance.³ The statute excludes from the Secretaries’ and BCMR/BCNRs’ authority only certain records of courts-martial and related administrative records.⁴ The BCMR/BCNR has almost complete power to change, delete, modify or add to the contents of military records. They can do anything to a veteran’s records except overturn a court-martial conviction.

The BCMR/BCNR are distinct from the Discharge Review Board (“DRB”) of each service, which only review the propriety of the discharge or dismissal of a veteran from the military. The DRB decisions can be appealed to the BCMR/BCNR.

- ii. Composition

Each branch of the military has a number of BCMR/BCNR members, from which individual BCMR/BCNR panels are comprised. By regulation, members of BCMR/BCNR panels should be high-ranking

¹ 10 U.S.C. § 1552(a)(1) (2006). An “error” is considered a “legal or factual error,” whereas an “injustice” is (when not also an error) “treatment by the military authorities which shocks the sense of justice, but is not technically illegal” that may lead to “a harsh, unfair, or inequitable result.” *See, e.g., Peoples v. United States*, 87 Fed. Cl. 553, 569 (2009).

² DODI 1336.01, Enc. 3 (Procedures) Section 5.

³ *See* Army Regulation 15-185, May 1, 2006, *available at* www.armypubs.army.mil/epubs/pdf/r15_185.pdf (Department of the Army policy and guidance on changing military records); SECNAV Instruction 5420.193, Nov. 19, 1997, *available at* www.donhq.navy.mil/bcnr/bcncr.htm (Department of the Navy); Air Force Instruction 36-2603, Mar. 5, 2012, *available at* www.e-publishing.af.mil/shared/media/epubs/AFI36-2603.pdf (Department of the Air Force); 33 C.F.R. part 52 (2012) (Coast Guard).

⁴ 10 U.S.C. § 1552(f).

civilians in the executive part of their military branch.⁵ Three members constitute a quorum for conducting reviews of applications, except in the

Coast Guard where three members make up each panel, but only two members are necessary to constitute a quorum.⁶

iii. Statute of limitations

The BCMR/BCNR normally operates under a three year limit for applications that starts upon the date of “discovery of alleged error or injustice.” This date is generally the date of discharge; however in the case of a transgender veteran seeking a name change to a DD 214, it would be the date of the court order granting the name change. The BCMR/BCNR can waive the three year limit if the Board determines that it “is in the interest of justice” to do so. A veteran must exhaust all other administrative remedies, including DRB consideration, before requesting a remedy from the BCMR/BCNR.

iv. Board Reading room

The DoD Boards’ Electronic Reading Room is a public website, located at <http://boards.law.af.mil>, where potential applicants for a discharge upgrade are able to review prior decisional documents issued by their respective Boards and obtain application forms to process a complaint.

b. What is the Request Process?

i. DD-149

An applicant’s request to amend a DD 214 must be made in writing by use of a “DD Form 149 Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552.” A DD Form 149 may be obtained online at:

<http://www.dtic.mil/whs/directives/forms/eforms/dd0149.pdf>.

1. Relief Requested

A veteran must state the relief requested in Item 5 of the DD form 149. In the case of a transgender veteran seeking to change his or her name on the DD 214, the relief is requested to correct and prevent an injustice, not to correct an error.

⁵ 32 C.F.R. §§ 581.3(c)(1), 723.2(a), 865.1; 33 C.F.R. § 52.11.

⁶ *Id.*

2. Personal Appearances

The veteran may request a personal appearance before the BCMR/BCNR by checking the appropriate box on DD Form 149, item 10. The BCMR/BCNR will decide whether a personal appearance is necessary to decide the veteran's case. All appearances before the BCMR/BCNR are in Washington DC. Travel expenses are the veteran's responsibility. The BCMR/BCNR grants very few personal appearances, so the veteran should try to fully present their case in writing. If a request for a personal appearance is granted, written notice will be mailed 30 days in advance of the hearing unless the notice period is waived by the applicant. The applicant must respond not later than 15 days before the hearing date, accepting or declining the offer of a hearing and, if accepting, provide information pertaining to counsel and witnesses. The BCMR/BCNR will decide the case in executive session if the applicant declines the hearing or fails to appear.

3. Representatives

A veteran may choose someone else to represent them. The representative should be named on DD Form 149, item 11. The BCMR/BCNR must approve any representative other than a veteran service organization staff member or a lawyer. If the veteran names a representative, the BCMR/BCNR is supposed to deal with the representative rather than directly with the veteran.

4. Supporting Evidence

The BCMR/BCNR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The BCMR/BCNR will correct military records only if the veteran can prove they are the victim of error or injustice. The applicant must supply evidence and records to support the request for correction of the military record because the BCMR does not conduct an independent investigation.⁷ The applicant's evidence must prove, by a preponderance of the evidence, that an error or injustice exists.⁸

For a name change, the veteran should include a copy of the court order granting the name change. Addition evidence showing

⁷ See Jan W. Serene, *Army Review Boards and Military Personnel Law Practice and Procedure*, 2010 Army Law. 4, *5

⁸ *Id.*

updated name and gender could be helpful, such as a U.S. Passport, a state driver’s license or identification card, a court order recognizing gender transition, or a statement from a physician.

5. Brief

The veteran’s own statement is important. Begin in item 6 of the DD Form 149 and continue in item 17, if necessary. The veteran may also put their statement on plain paper and attach it to the Form 149. The brief should be limited to not more than 25 pages. The veteran should explain what happened and why it is an error or injustice in simple, direct terms. The following arguments should be considered in requesting a name change on a DD 214 for a transgender veteran.

a. Transgender Individuals Suffer From Discrimination

It is estimated that as many as 140,000 of the nation’s approximately 26 million veterans may be transgender.⁹

Transgender veterans face the serious possibility of discrimination in employment opportunities. Employers commonly require the DD 214 from veteran applicants, particularly for employment in positions that have a preference for veterans. Presenting a DD 214 with a name (and implied gender) that is at odds with the name and gender reflected accurately in court orders, state identification cards, passports, and revised birth certificates immediately “outs” the veteran as transgender. In the best cases, this results in confusion and awkward explanations. In the worst, it leads to outright bias, bigotry, and harassment. In fact, a recent study found that 47% of transgender individuals surveyed had experienced an adverse job outcome—such as being fired, not hired, or

⁹ Dr. Gary Gates of the Williams Institute estimates that there are roughly 700,000 transgender people in the United States and a recent National Transgender Discrimination Survey showed that 20% of them have been a part of the military at some point. Colin Daileida, “*For Transgendered Soldiers, Don’t Ask Don’t Tell Carries On*,” *The Atlantic* (Oct 29 2012), available at <http://www.theatlantic.com/sexes/archive/2012/10/for-transgendered-soldiers-dont-ask-dont-tell-carries-on/264225/>; Jack Harrison-Quintana and Jody L. Herman, “*Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey*,” *LGBTQ Policy Journal* at the Harvard Kennedy School, Vol. 3 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Quintana-Herman-LGBTQ-Policy-Journal-2013.pdf>. There are some estimates that there may be as many as 300,000 transgender U.S. veterans. See, e.g., Press Release, Transgender Americans Veterans Association, *The Employment Non-Discrimination Act (ENDA)* (Oct. 13, 2007), available at <http://www.tavausa.org/PressReleases/TAVA%20Press%20Release%20on%20ENDA.html>.

denied a promotion—because of their transgender status.¹⁰ Further, 90% of those surveyed reported either experiencing harassment, mistreatment, or discrimination on the job, taking action (like hiding who they are) to avoid it, or both.¹¹ Yet, there is no federal law that consistently protects transgender individuals from employment discrimination.¹² Only 17 states and the District of Columbia provide protection from employment discrimination on the basis of gender expression.¹³ As a result, transgender veterans face serious possibilities of discrimination in employment, including being fired, being denied a promotion and experiencing harassment on the job.

Transgender veterans may be systematically denied access to veterans benefits and services. The DD 214 is crucial for veterans to prove their record of service in connection with various veterans benefits—including, among other things, applying for educational opportunities, applying for benefits for dependents, and accessing the same benefits they had while on active duty status. Just as in the employment context, inconsistencies between the veteran’s DD 214 and other legal identification documents can result in denial of these benefits. Even when these benefits are allowed, access is often delayed or provided only after the veteran is subjected to difficult and embarrassing administrative burdens requiring an explanation of these discrepancies.

b. The DD 214 is an Identity Document

Far from being merely a historical document that is filed in an archive and rarely examined, a DD-214 is an identity document, like birth certificates and other similar documents, which must be produced in many situations.

¹⁰ Jaime M. Grant et al., *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force 3 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

¹¹ *Ibid.*

¹² The Employment Non-Discrimination Act (“ENDA”), which was passed by the United States Senate of the 113th Congress, would have provided basic protections against workplace discrimination on the basis of sexual orientation or gender identity. It was never passed by the United States House of Representatives and is yet to be introduced in the 114th Congress. Although the Equal Employment Opportunity Commission (“EEOC”) has ruled that discrimination based on a person’s transgender status constitutes unlawful sex discrimination, this ruling is binding only on federal agencies and not on any court ruling on discrimination in the private sector. *Macy v. Holder*, No. 0120120821 (E.E.O.C. Apr. 20, 2012).

¹³ See Human Rights Campaign, “Statewide Employment Laws and Policies,” at http://www.hrc.org/files/assets/resources/employment_laws_1-2014.pdf.

The DD-214 identifies an individual as a veteran to potential employers and to government agencies providing benefits. Getting through life with inaccurate or inconsistent identity documents is a bureaucratic nightmare with far-reaching consequences. Without identity documents that accurately reflect who they are and that do not unnecessarily call attention to the fact that the individual is transgender, transgender people are simply unable to live, work and participate fully in society.

It is the veteran, not the veteran's name (present or former) or gender, who has served his or her country and who has earned the benefits, services, and preferences that come from military service. A name or gender change does not change the honorable service of a veteran. Every veteran who has honorably served their country is entitled the benefits and privileges they have earned and should have an unfettered opportunity to claim such benefits and privileges.

c. The Relief is Requested to Prevent an Injustice

The Board's decision to grant a request to amend a DD 214 to account for a change in name must differentiate between the Board's authority to "correct" factual and legal errors and its authority to "remove" injustices. A Board would be correct to conclude that because an applicant's DD 214 correctly reflects the name of the applicant "during the period of the applicant's service," no amendment of the form to correct an "error" is warranted; however, for the Board to stop its consideration of the applicant's request at this point would completely abrogate the Board's authority to correct the form to remove an injustice. The statute's distinction between correction of errors and removal of injustice precludes the Board from collapsing the inquiry into a single correction of errors test.

Historically, BCMR/BCNRs have claimed that neither individual military branches, nor the DoD itself, have established policies to amend military records accounting for a change in name occurring after discharge or retirement¹⁴ and that internal guidance restricts their authority to amend DD 214s in the absence of any

¹⁴ *E.g.*, AFBCMR No. BC-2003-04051 (Apr. 21, 2004) (claiming that neither the Air Force nor the DoD had procedures in place to allow for a post-service change in gender to be acknowledged in DD 214).

“error.”¹⁵ Nothing in the governing statutes or the guidance of higher authority limits the Boards’ power to amend records only in those circumstances specifically and affirmatively delineated in the written guidance. The BCMR/BCNR have based their determinations on the military’s interest in “preserving the accuracy of military records.”¹⁶ While this rationale is applicable in cases of amending records where factual errors do not exist, this interest is tempered in cases of injustice. For cases where the interests of justice dictate that an amendment should be made, preservation of historical accuracy is secured simply by keeping a copy of the corrective action with the original DD 214 in the personnel file.¹⁷ Furthermore, as noted above, this justification impermissibly collapses the two statutory standards into one.

Thus, while a discrepancy in name, or explicit references to former names used, may not be a factual “error,” these determinations usually do not analyze an applicant’s case independently in order to determine if a record should be amended to remove an “injustice” specifically.

d. Reference to the Prior Name Will Not Prevent Injustice

The inclusion of a former name on the DD 214 defeats the purpose of changing the name on the DD 214 and would lead to the same injustice of employment discrimination or delayed benefits and privileges that is incurred by not changing the name on the DD 214.

e. Other Governmental Authorities Permit Changes to Similar Documents

Current statutory law generally permits transgender individuals in nearly all of the fifty states to change their name and gender on their birth certificate and receive a new

¹⁵ See, e.g., ARMY BOARD FOR CORRECTION OF MILITARY RECORDS, APPLICANT’S GUIDE TO APPLYING TO THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS 4 (2008), available at http://arba.army.pentagon.mil/documents/ABCMR_Applications_Guide_29_January_2008_edition.doc (stating that military records (e.g., DD 214s) are “historical” and record facts during the time that an applicant served).

¹⁶ E.g., ABCMR No. AR20040007301 (June 30, 2005) (“The Army has an interest in maintaining the accuracy of its records. The data and information contained in those records should reflect the conditions and circumstances that existed at the time the records were created.”); ABCMR No. AR20090008061 (Nov. 3, 2009) (same).

¹⁷ See AFBCMR, No. BC-2003-04051 (Apr. 21, 2004).

or amended birth certificate.¹⁸ Most states will grant transgender individuals a new birth certificate; others grant an amended birth certificate, often one marked “amended” but without specifying the amended items.¹⁹ The laws permitting such changes to birth certificates are evidence of the legal conclusion that birth certificates, once argued to be historical documents that record facts at the time of birth, are not, and need not be, treated as such perfect proof of a particular fact that countervailing values in having them changed should be ignored. It has long been recognized that the reasoning behind these rules permitting record changes is that if information contained therein is of little interest to the public and if preservation of that data might harm the individual, the records may be changed to enable the person to acquire respectability in the community.²⁰ For example, if the parents of an illegitimate child eventually marry, the child’s birth certificate will be changed so that he will be able to acquire the status of a child born in lawful wedlock. A logical extension of such reasoning would mandate similar treatment for the change of a transgender veteran’s DD 214, since disclosure of the veteran’s former name may well subject him or her to more harassment and discrimination than would a revelation of illegitimacy.

Similarly, the U.S. Department of State permits transgender individuals to amend their “Consular Report of Birth Abroad of a Citizen of the United States of America” (Form FS-240), which is the equivalent of a federal birth certificate for U.S. citizens born outside of the United States, for name and gender changes.²¹ The policy for amending U.S. passports for name and gender changes is the same.²² Military records, such as a DD 214, are one of the documents that may be presented as evidence of the changed name.²³ Thus, the Board’s policy that a DD 214

¹⁸ Only three states (Idaho, Ohio, and Tennessee) forbid the amendment of birth certificates based on sex changes. See Lambda Legal, “*Sources of Authority to Amend Sex Designation on Birth Certificates*,” <http://www.lambdalegal.org/publications/sources-of-authority-to-amend> (updated Oct. 23, 2013).

¹⁹ *Id.*

²⁰ See, e.g., *Sklaroff v. Stevens*, 120 A.2d 694 (R.I. 1956) (“A principal objective of the pertinent statutes of Massachusetts and Rhode Island is . . . in so far as practicable to expunge from the birth records of the place where [a child is born out of wedlock] any reference to illegitimacy.”).

²¹ U.S. Department of State, Foreign Affairs Manual – Volume 7 Consular Affairs, 7 FAM 1447 and 7 FAM 1340 Appendix M (2013).

²² See, generally, U.S. Department of State, Foreign Affairs Manual – Volume 7 Consular Affairs, 7 FAM 1300 Appendices C and M (2013).

²³ U.S. Department of State, Foreign Affairs Manual – Volume 7 Consular Affairs, 7 FAM 1330 Appendix C (2013).

cannot be changed because, like a birth certificate, it is a historical document that records facts at the time it is issued is contrary to the policies of 47 states and other agencies of the federal government with respect to similar historical documents.

ii. Review by the Board

1. Advisory Opinions

After an application is received, one or more offices in the applicable military branch may prepare an advisory opinion on the case. The advisory opinion will be sent to the BCMR/BCNR with the veteran's case file. If the advisory opinion recommends denial of the veteran's request, the BCMR/BCNR will send it to the veteran for comment. The advisory opinion is only a recommendation; the BCMR/BCNR will make the decision in the case. The BCMR/BCNR will ask for the veteran's comments on the advisory opinion within 30 days. The veteran may request an additional 30 days if needed. Reasonable requests are normally granted. It may be unnecessary for the veteran to comment on the advisory opinion. If the veteran has nothing further to say, no response is necessary. Failure to comment on an advisory opinion does not mean the veteran agrees with it, nor will it prevent a full and fair consideration of the veteran's application.

2. Panels

A panel consisting of at least three BCMR/BCNR members (who will be DoD civilians) will consider each application that is properly brought before it. One panel member will serve as the chair. The panel members' majority vote constitutes the action of the BCMR/BCNR, however, a dissenting member may submit a minority opinion for consideration by the service Secretary. The Board's findings, recommendations, and in the case of a denial, the rationale will be in writing.

Except as otherwise provided, a decision by the BCMR/BCNR is final when it denies any application (except for actions based on reprisals investigated under 10 U.S.C. 1034) or grants any application in whole or in part without a hearing if the relief is as recommended by the proper staff agency in an advisory opinion, is unanimously agreed to by the BCMR/BCNR panel, and does not involve an appointment or promotion requiring confirmation by the Senate. The BCMR/BCNR will forward the decisional document to the appropriate service Secretary for final decision in any case in which a hearing was held, the facts involve reprisals under the Military Whistleblower Protection Act, or the Board recommends

relief but is not authorized to act for the service Secretary on the application.

The BCMR/BCNR is the highest level of administrative appeal and provides the final Service decision. If the BCMR/BCNR denies a veteran's case, the next step is to request reconsideration or file a suit in the federal court system.

3. Reconsideration

An applicant may request the reconsideration of a BCMR/BCNR decision under the following circumstances:

a. If the BCMR/BCNR receives the request for reconsideration within one year of the BCMR/BCNR's original decision and if the Board has not previously reconsidered the matter, the BCMR/BCNR staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the Board's prior consideration. If new evidence has been submitted, the request will be submitted to the BCMR/BCNR for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the BCMR/BCNR staff will return the application to the applicant without action.

b. If the BCMR/BCNR receives a request for reconsideration more than one year after the Board's original decision or after the BCMR/BCNR has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

3. Recent Developments

a. NLGBT Bar Cases

b. ACLU NJ Cases

c. AF Guidance Memorandum

The AF has adopted a policy of supporting changes to the name on the DD 214 of a transgender veteran.

d. Proposed legislation – H.R. 1735, Sec. 536.

This section would allow veterans to change their name on a certificate of discharge or an order of acceptance of resignation in order to reflect change in gender identity and a different name.

4. References

DEPARTMENT OF DEFENSE:

- DoD Directive 1332.41 – Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)

<http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf>

ARMY: <http://arba.army.pentagon.mil/abcmr-overview.cfm>

- Army Regulation 15-185 - Army Board for Correction of Military Records
http://www.army.mil/usapa/epubs/pdf/r15_185.pdf
- Code of Federal Regulations, Title 32, Part 581, Section 581.3
<http://www.gpo.gov/fdsys/pkg/CFR-2002-title32-vol3/pdf/CFR-2002-title32-vol3-sec581-3.pdf>

NAVY/MARINE CORPS: <http://www.donhq.navy.mil/bcnr/bcnr.htm>

- SECNAVINST 5420.193 – Board for Correction of Naval Records
<http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.193.pdf>
- Code of Federal Regulations, Title 32, Part 723
<http://www.gpo.gov/fdsys/pkg/CFR-2011-title32-vol5/pdf/CFR-2011-title32-vol5-part723.pdf>

AIR FORCE:

- AF Pamphlet 36-2607 – Applicant's Guide to the Air Force Board for Correction of Military Records (AFBCMR)
<http://www.afpc.af.mil/shared/media/document/AFD-130528-027.pdf>
- AFI 36-2603 – Air Force Board for Correction of Military Records (AFBCMR)
http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2603/afi36-2603.pdf
- Code of Federal Regulations, Title 32, Part 865, Subpart A
<http://www.gpo.gov/fdsys/pkg/CFR-2012-title32-vol6/pdf/CFR-2012-title32-vol6-part865.pdf>

COAST GUARD: <http://www.uscg.mil/legal/BCMR.asp>

- Code of Federal Regulations, Title 33, Part 52
<http://www.gpo.gov/fdsys/pkg/CFR-2007-title33-vol1/pdf/CFR-2007-title33-vol1-part52.pdf>