

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230004040

APPLICANT REQUESTS: In effect:

- An upgrade of his under honorable conditions (general) discharge
- Personal appearance via video or telephone

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 he was an honorable Soldier, who was not given a fair chance after one bad choice. He fully complied with the investigation after he was caught off base. Prior to the incident his record was highly decorated, but he was not allowed to continue his military service. He was not given a second chance after a lapse in judgment, even though he was already under contract for a second enlistment when he made a poor choice which he fully accepted and cooperated with the investigation. His commanding officer who was new to the unit and chose not to allow him any other option, other than a UOTHC. He has attended college and moved on from the Army, although it still haunts him.
3. A review of the applicant's service record shows he enlisted in the Regular Army for 3 years on 24 June 1999. He completed training with award of the military occupational specialty 92G (Food Service Specialist). He reenlisted for 6 years on 12 July 2002 and the highest grade he held was E-5.
4. On 28 June 2003, while serving in Korea he and three other Soldiers attended a Rave on 9 September 2003 where they purchased and used "ecstasy". They were arrested by Korean authorities, tried, and found guilty of possession and use of

dangerous drugs. The applicant's punishment in the Korean court was imprisonment for 10 months, suspended for 2 years, and a civil assessment in the amount of 180,000 Won.

5. The Army Criminal Investigation Division was party to a joint investigation of the incident and found that there was probable cause that the applicant (and the other Soldiers) had purchased and consumed ecstasy.
6. The applicant was afforded a medical examination on 18 November 2003 that found no abnormal conditions except hearing loss in the left ear.
7. A DA Form 3822-R (Report of Mental Status Evaluation), dated 24 December 2003, shows the applicant had no abnormalities in behavior, level of orientation, mood, thinking process, thought content, or memory. He was determined to be mentally capable to understand and participate in the proceedings deemed appropriate by command.
8. The applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14- 12c (Commission of a Serious Crime) and paragraph 14-9 (Conviction by a Foreign Court). His commander indicated he was recommending the applicant receive a general discharge. He noted the specific reasons was wrongful possession and use of a controlled substance:
9. The applicant acknowledged receipt of the notification on 4 January 2004 and consulted with legal counsel on 6 January 2004. He was advised of the basis for the contemplated discharge, the possible effects of an under honorable conditions discharge, and the procedures and rights that were available to him. He submitted a conditional waiver and elected not to submit a statement in his own behalf.
10. The applicant's immediate commander formally recommended his separation from service under the provisions of AR 635-200, paragraph 14- 12c and paragraph 14-9.
11. The separation authority approved the discharge recommendation, and directed the applicant be issued a General Discharge Certificate.
12. The applicant was discharged on 13 March 2004 in the pay grade of E-5. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c for misconduct with an under honorable conditions (general) character of service, a Separation Code JKD, and a Reentry Code of 3. He was credited with 4 years, 8 months, and 20 days of net active service with no lost time. His awards are shown as the:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal
- Army Good Conduct Medal
- National Defense Service Medal
- Korean Defense Service Medal
- Noncommissioned Officer's Professional Development Ribbon
- Army Service Ribbon
- Marksman Qualification Badge with Rifle Bar

13. In determining whether to grant relief, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was partially warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The evidence shows the applicant was discharged due to misconduct – after he was convicted by civil court for illegal drugs. He received a general discharge. The Board found no error or injustice in his separation processing. Additionally, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

b. The Board did note however that the applicant's service from first date of enlistment to the date before his last reenlistment was honorable. For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, in addition to listing immediate reenlistment(s), an entry is required for continuous honorable service from first day of service for which DD Form 214 was not issued until date before commencement of current enlistment.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 to show in the Remarks Block: CONTINUOUS HONORABLE SERVICE FROM 19980813 UNTIL 20020712

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge.

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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 15–185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR). Paragraph 2-9 states that the ABCMR 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.

3. 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.

a. 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. It provides that:

a. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

d. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was, or could be authorized for that same or relatively similar offense under the UCMJ.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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 on the basis of equity, injustice, or clemency grounds, Boards 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//