

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]
[REDACTED]

BOARD DATE: 17 November 2023

DOCKET NUMBER: AR20230004418

APPLICANT REQUESTS: in effect –

- an upgrade of his under honorable conditions (general) discharge to fully honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant's statement

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, in effect:

a. He is requesting an upgrade of his discharge to honorable. He was not allowed to reach his Expiration Term of Service (ETS). He was given an illegal urinalysis result and reduced in rank. He was often called the "N word" while serving in his unit and performing his duties. He is 66 years and was diagnosed with cancer. God forbid he is unable to be it. He is requesting an upgrade in hopes that his family can lay him to rest with the military's help.

b. He also states:

- he was excellent at his job and promoted to the rank of sergeant (SGT)
- officers and others lamented him; and would come to see him perform his duties

- while assigned to another unit (394th Forward Attachment) he was in-charge of drug and alcohol tests
- he had under a year left on his current enlistment and was transferred to Fort Hood, TX; and this is where his career ended
- he was assigned to a unit where only 30 Black and Hispanic troops were assigned; they were all in one platoon
- he arrived at his unit and introduced himself to the first sergeant and was immediately told he had to take a urine test
- he was unable to provide a complete sample and was told to return
- he returned to complete his urinalysis test and was given the same container; he asked for a new container and the unit refused to give him one
- his unit stated the container was his and no one tampered with it; he let the unit know it was against military rules and regulations
- he spoke with the first sergeant and asked for his help
- he was eventually told that he had tested positive for marijuana; he requested to test immediately, and his unit refused
- he was not allowed to ETS out of the Army and was barred from reenlistment

3. This case contains administrative corrections.

4. A review of the applicant's official military record shows the following:

a. He enlisted in the Regular Army for 3 years on 6 March 1978.

b. DD Forms 4 (Enlistment/Reenlistment Document - Armed Forces of the United States) show he reenlisted on two separate occasions for 3 years on 8 September 1980 and 8 June 1983.

c. Orders Number 339-30 published by the United States Army Regional Personnel Center, Nurnberg, Germany, promoted the applicant to the rank of SGT/E-5, effective 6 December 1983, with a date of rank of 1 November 1983.

d. DA Form 2-1 (Personnel Qualification Record), item 35 (Record of Assignments) shows he was assigned to his unit at Fort Hood, TX on or about 10 August 1985.

e. His record contains documents which show the date of his urinalysis test was on 19 August 1985.

f. On 28 September 1985, DA Form 5180-R (Urinalysis Custody and Report Record) shows the Chief, Drug Abuse Detection Officer certified that the applicant's positive urinalysis test results for marijuana were correctly determined by proper laboratory procedures and the test results were correctly annotated.

g. On 15 October 1985, the applicant's immediate commander was officially notified of the applicant's positive urinalysis.

h. On or about 17 October 1985, the applicant's chain of command was notified that the applicant's positive urine sample would be retained for an additional 120 days.

i. On 18 October 1985, DA Form 4856-R (General Counseling Form) shows the applicant was counseled about his positive urinalysis test results and that he would be referred to the Squadron Commander for Uniform Code of Military Justice (UCMJ) action. He signed the form and provided no comments.

j. On or about 29 October 1985, DA Form 4126-R (Bar to Reenlistment Certificate) shows a Bar to Reenlistment was initiated against the applicant. The Bar to Reenlistment was approved by the immediate commander. The applicant's record is void of an appeal of the Bar to Reenlistment.

k. On 18 November 1985, he underwent a ETS medical examination and was cleared for ETS.

l. On 5 December 1985, DA Form 3822-R (Report of Mental Status Evaluation) shows the applicant underwent a mental status evaluation and was psychiatrically cleared for separation action.

m. On 6 December 1985, the immediate commander notified the applicant of his intention to initiate action which may result in his separation from, or retention in, the United States Army for the abuse of illegal drugs under the provisions of paragraph 14-12c, Chapter 14, Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel). The specific allegation for the proposed separation action was based on the positive urinalysis on or about 19 August 1985. The commander also informed the applicant of his rights, and he acknowledged receipt of the notification.

(1) On 10 December 1985, legal counsel advised the applicant of the basis for his contemplated separation and its effects, the rights available to him, and the effect of a waiver of his rights, the applicant personally made the choices indicated in the statement. The applicant requested consideration of his case by an Administrative Separation Board (ASB) and elected not to submit statements in his own behalf. He also requested copies of the documents that would be sent to the separation authority supporting the proposed separation.

(2) The immediate commander formally recommended the applicant for discharge and indicated, it was not feasible or appropriate to accomplish other disposition because of positive urinalysis usage and the applicant should not be

retained in the Army for positive urinalysis usage. The intermediate commander recommended approval of the separation action.

n. On 21 January 1986 –

(1) The applicant accepted Non-Judicial Punishment under the provisions of Article 15, UCMJ, for knowingly and wrongfully using some amount of marijuana. His punishment consisted of reduction to specialist four (SP4)/E-4; forfeiture of pay, suspended; and extra duty, suspended. He did not appeal.

(2) He waived consideration of his case by an ASB.

(3) The separation authority approved the applicant's discharge and directed he be issued a General Discharge Certificate.

o. On 7 February 1986, he was discharged from the Army with an "under honorable conditions" character of service. He completed 7 years, 11 months, and 2 days net active service. DD Form 214 shows in:

- item 4a (Grade, Rate or Rank) – SP4
- item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) –
 - Army Good Conduct Medal (Bronze, 2 loops)
 - Noncommissioned Officer Professional Development Ribbon
 - Army Service Ribbon
 - Overseas Service Ribbon
 - Expert Badge (Rifle)
- item 18 (Remarks) – "Immediate reenlistment this period: 780306-800907; 800908-830607; 830608-860207"
- item 25 (Separation Authority) – paragraph 14-12c, AR 635-200
- item 26 (Separation Code) – JKK (misconduct, drug abuse)
- item 27 (Reenlistment Code) – RE-3, 3C (ineligible for enlistment unless waiver granted)
- item 28 (Narrative Reason for Separation) – "Misconduct - drug abuse"

5. The ABCMR is not authorized to grant requests changing the character of service, narrative reason for separation, and/or separation code of discharges solely for the purpose of making the applicant eligible for veterans' benefits; however, in reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance before the Board 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 a portion of the requested relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the misconduct and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, and, in the absence of post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined the character of service the applicant received upon separation was not in error or unjust.

2. Prior to closing the case, the Board did note the administrative notes below and agreed that the correction should be made to more accurately reflect the depict the military service of the applicant.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented 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 reissuing him a DD Form 214 for the period ending 8 June 1983 showing in block 18 (REMARKS):

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE ACTIVE SERVICE FROM 780306 UNTIL 830607

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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.

ADMINISTRATIVE NOTE(S):

The applicant's DD Form 214, item 18 (Remarks) should be amended in accordance with AR 635-8 (Separation Processing and Documents), by adding the following entries:

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- Continuous Honorable Active Service From 780306 Until 830607

REFERENCES:

1. Title 10, USC, 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. AR 15-185 (ABCMR), states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and the ABCMR is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Paragraph 2–11 states 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.

3. AR 635-200 (Personnel Separations - Enlisted Personnel) in effect at the time sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14, Section III (Acts or Patterns of Misconduct), paragraph 14-12c (Commission of a serious offense) provides that Soldiers are subject to separation for commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial.

4. 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.

a. 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.

b. 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, 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. 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.

5. AR 635-8 (Separation Processing and Documents) prescribes the transition processing function of the military personnel system.

a. Paragraph 5-1 (When to prepare the DD Form 214) states, the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clearcut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.

b. Block 18 (Remarks) states, in pertinent part, use this block for Headquarters, Department of the Army mandatory requirements when a separate block is not available or for conditional entries as follows:

(1) Mandatory entry: "SOLDIER (HAS) OR (HAS NOT) COMPLETED FIRST FULL TERM OF SERVICE." This information assists the State in determining eligibility for unemployment compensation entitlement.

(2) For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, enter "IMMEDIATE REENLISTMENTS THIS PERIOD" and specify inclusive dates for each period of reenlistment.

(3) For Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable," enter "Continuous Honorable Active Service From" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment). Then, enter the specific periods of reenlistment as prescribed above.

//NOTHING FOLLOWS//