

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 November 2023

DOCKET NUMBER: AR20230005044

APPLICANT REQUESTS: upgrade of his under honorable conditions (general) discharge. Additionally, he requests a personal appearance before the Board.

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 kicked out due to criminal charges, but the court dismissed them. He has been going through life.
3. The applicant enlisted in the Regular Army on 29 April 2008 for 3 years and 20 weeks. His military occupational specialty was 92G (Food Service Operations).
4. Military Police (MP) Report, dated 2 May 2009, shows the applicant's vehicle was parked in the middle of the roadway. A strong odor of an unknown alcoholic beverage was detected emitting from the applicant. He had bloodshot, watery eyes and slurred speech. He provided a sample of his breath for a portable breath test resulting in a .099% level. He was apprehended, transported, and elected to do a breath test. His sample was .098%. He was processed, issued two central violation notices, a post driving suspension letter, and a State revocation letter. The MP Report-Additional Offenses, shows an offense of improper parking (parked vehicle in the roadway).
5. The applicant received counseling on 2 May 2009, regarding Driving Under the Influence (DUI). He was arrested and charged with DUI of alcohol on Fort Carson, CO. He was administered a breathalyzer and was over the legal limit to operate a motor vehicle. He was also charged with impeding traffic because the vehicle he was driving was stopped in the roadway. Although, he had not been to court on these charges,

there was sufficient evidence that these charges were correct. His driving privileges on post had been revoked as of this day for one year. He was not to operate any vehicle on post until after one year and until he had his privileges reinstated.

6. The applicant received counseling between 30 July 2009 and 27 August 2009 for:

- wrongful possession of a controlled substance, false official statement
- failure to report and failure to be at place of duty
- failure to report

7. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 11 September 2009 for:

- willfully disobeying an order from a noncommissioned officer (NCO) between on or about 5 August 2009 and on or about 12 August 2009
- willfully disobeying an order from an NCO between on or about 15 August 2009
- his punishment consisted of extra duty

8. A Request for Mental Health Evaluation, dated 29 September 2009, shows the applicant's reason for separation was Chapter 14-pattern of misconduct and previous psychiatric treatment, Army Substance Abuse Program (ASAP). Item 5 (Reason for Administrative Action) shows the behaviors that lead to the request were DUI, drug possession, and rehabilitation failure. The actions the commander had taken regarding the applicant, were to correct this problem was ASAP.

9. A Report of Mental Status Evaluation, dated 1 October 2009, shows he had the mental capacity to understand and participate in the proceedings, was mentally responsible, met retention standards and was psychologically cleared for administrative separation.

10. The El Paso County Sheriff's Office Booking Report, dated 2 October 2009, shows the applicant was charged with illegal discharge of a firearm and unlawful carrying of a concealed weapon.

11. The applicant was counseled on 2 October 2009, for conduct that brings discredit to the military (detained by civil authorities for carrying a concealed weapon); and failure to report on 2 October and 5 October 2009.

12. The applicant's immediate commander notified him of his intent to initiate separation actions against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12b, for patterns of misconduct. As the specific reasons, his commander noted the applicant had committed the following offenses: illegal discharge of a firearm, unlawfully carrying a concealed

weapon, DUI, and disobeyed orders from a senior NCO. The applicant acknowledged receipt of the proposed action on the same date.

13. The applicant consulted with legal counsel on 20 October 2009 and was advised of the basis for the contemplated actions to separate him and of the rights available to him.

a. He understood that he might expect to encounter substantial prejudice in civilian life. He waived counsel and presentation by military and civilian counsel.

b. He elected to submit a statement in his own behalf. He states that he grew up in a bad community, didn't know his father and had picked up skills from the streets which were no good. He now had a family and wanted to do better for his daughter/family. He asked for a second chance and a rehabilitative transfer to another unit because that would help a lot and he would be getting away from the evildoers.

14. The applicant's commander formally recommended his separation on 20 October 2009, under the provisions of AR 635-200, paragraph 14-12b, for patterns of misconduct. The chain of command recommended approval.

15. The separation authority approved the recommended action on 3 November 2009 and directed the issuance of a general, under honorable conditions discharge.

16. The applicant was discharged on 25 November 2009. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12B, for a pattern of misconduct. He was assigned Separation Code JKA with Reentry Code 3. His characterization of service was under honorable conditions (general). He completed 1 year, 6 months, and 27 days of net active service. His awards include the: Army Achievement Medal, National Defense Service Medal, and Global War on Terrorism Service Medal.

17. Chapter 14 of this regulation establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave.

18. On 18 January 2013, the Army Discharge review Board (ADRB) determined the applicant was properly and equitably discharged and denied his request for a change in the character and/or reason of his discharge.

19. In reaching its determination, 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:

After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, applicable regulatory guidance and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the frequency and nature of the misconduct, the reason for separation and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. The Board found no clear or convincing evidence of an error or injustice and concluded he was properly and equitably discharged in accordance with regulatory guidance. As the applicant has the burden of proving an error or injustice by a preponderance of the evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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. AR 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.

3. Army Regulation (AR) 635-200 sets forth the basic authority for the separation of enlisted personnel.

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. Chapter 14 of this regulation establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Service Discharge Review Boards and Service Boards for Correction of

Military/Naval Records (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//