

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 December 2023

DOCKET NUMBER: AR20230005380

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) discharge to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Drug Screening Lab Report

FACTS:

1. The applicant did not file within the three-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 his discharge should be upgraded because he is a positive role model for his children. His son is playing college football and his daughter is joining the military. He has also been clean from drugs for 11 years and is providing a recent drug screening as proof.
3. The applicant enlisted in the Regular Army on 1 October 2003, for a period of 3 years. On 1 January 2006, he was advanced to the rank/pay grade of specialist/E-4.
4. On 17 February 2006, he reenlisted for a period of 6 years. He served in Iraq from 21 September 2008 to 20 September 2009.
5. On 26 August 2011, the applicant accepted field grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for making a false official statement to a superior noncommissioned officer (NCO); willfully disobeying a lawful order from a superior NCO; and three specifications of failing to go at the time prescribed to his appointed place of duty. His punishment consisted of reduction to private/E-1 and forfeiture of \$733.00 pay for one month.

6. On 30 September 2011, the applicant was counseled for testing positive for illegal drugs following a urinalysis. He was advised that he was scheduled for an appointment with the Criminal Investigation Division. He was further advised that conduct of this nature could result in involuntarily separation from the Army.
7. On 12 October 2011, the applicant was counseled and advised that he was being recommended for separation action under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c.
8. On 23 October 2011, the applicant accepted field grade NJP under the provisions of Article 15, UCMJ for wrongfully using marijuana; making a false official statement to a superior NCO; failing to go at the time prescribed to his appointed place of duty; and willfully disobeying a lawful order from a superior NCO. His punishment consisted of extra duty for 60 days.
9. On 31 October 2011, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under the provisions of Army Regulation 635-200, paragraph 14-12, for commission of a serious offense. The specific reason cited was the applicant's positive urinalysis for the use of marijuana. He was advised that he was being recommended for an under other than honorable conditions discharge, but the final determination of his characterization of service would be made by the separation authority. The applicant acknowledged receipt of the proposed separation notification the same date.
10. On 31 October 2011, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service, under the provisions of Army Regulation 635-200, Chapter 14, by reason of commission of a serious offense.
11. On 2 November 2011, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a request for a conditional waiver of his right to have his case considered by an administrative separation board contingent upon him receiving a characterization of service no less favorable than general, under honorable conditions.
12. The applicant's interim commanders recommended approval of the separation action, and issuance of an under honorable conditions (general) discharge.
13. On 22 November 2011, the separation authority approved the applicant's conditional waiver, and recommendation for separation. He directed the applicant be issued an under honorable conditions (general) discharge.
14. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 13 December 2011, under the provisions of

Army Regulation 635-200, paragraph 14-12c, by reason of Misconduct (Drug Abuse), with separation code "JKK" and reentry code "4." His service was characterized as under honorable conditions (general). He was credited with completion of 8 years, 2 months, and 13 days of net active service this period. He had no lost time.

15. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his discharge. On 5 May 2017, the ADRB, informed the applicant that after careful review of his application, military records, and all other available evidence, the Board determined he was properly and equitably discharged and denied his application.

16. The applicant provides a drug screening lab report, dated 31 January 2023, which shows he tested negative for several drugs. The report is available in its entirety for the Board's consideration.

17. 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:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency.

2. A majority of the Board considered the applicant's statement, the evidence he provided indicating he no longer uses drugs, and the fact that he served in Iraq for a year sufficient as a basis for clemency. Based on a preponderance of the evidence, a majority of the Board determined the applicant's character of service should be changed to honorable.

3. The member in the minority found insufficient evidence of in-service mitigating factors and found that, other than his own statement, the applicant provided insufficient evidence of post-service achievements in support of a clemency determination. Based on a preponderance of the evidence, the member in the minority determined the character of service the applicant received upon separation was not in error or unjust.

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 is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as honorable.

2/12/2024

X █

CHAIRPERSON
█

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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. 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 regulation provides 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). 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 appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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/NR) 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 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.

//NOTHING FOLLOWS//