

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 January 2024

DOCKET NUMBER: AR20230005931

APPLICANT REQUESTS: to change his DD Form 214 (Report of Separation from Active Duty) for the period ending 6 January 1978 to show "Honorable" in Item 9e (Character of Service) instead of Not Applicable (NA), and a personal appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214, 6 January 1978

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, in effect, he informed his recruiter about a charge on his juvenile record and the recruiter told him not to worry about the charge because it was before he turned 18, and it would not stop him from enlisting. He was discharged during his last week of school because of the charge, but he did complete boot camp. He did not know his time in service was not being honored until he applied for Veterans Affairs medical insurance.
3. A review of the applicant's service record shows:
 - a. DD Form 1966/1 (Application for Enlistment – Armed Forces of the United States), dated 18 May 1977, shows he answered NO to the questions in block 40 (Involvement with Police or Judicial Authorities). Block 40 on this form noted that answers to the questions would be verified with the Federal Bureau of Investigation (FBI), and other agencies to determine any previous records of arrest or convictions or juvenile court adjudications. If the applicant concealed such records at the time, he may, upon enlistment, be subject to disciplinary action under the Uniform Code of Military

Justice (UCMJ) and/or discharged from the military service with an other than honorable discharge.

b. DD Form 4 (Enlistment or Reenlistment Agreement – Armed Forces of the United States) shows he enlisted in the Regular Army on 7 June 1977.

c. DA Form 2496 (Disposition Form), dated 2 November 1977, shows a review of the applicant's 201 file (personnel record) revealed he did not list his civil arrests in item 40, DD Form 1966, and his security clearance action was terminated.

d. On 21 November 1977, the applicant made a sworn statement (DA Form 2823) that sergeant (SGT) P told him not to say anything about breaking and entering. SGT P told him if he did say anything about it, he would not be able to get into the U.S. Army. He stated for the first charge, he received a court date, went to court, and was charged \$250.00 for breaking and entering with intention to steal. The second charge was NA.

e. On 23 November 1977, the applicant underwent a medical examination for the purpose of separation, and he noted he was in good health.

f. He underwent a mental status evaluation on 23 November 1977 and the clinical interview did not reveal any significant mental illnesses.

g. On 6 December 1977, the applicant gave another sworn statement, wherein he stated he believed he was a good Soldier and believed he had the right to stay in the U.S. Army. There were a lot of people leaving the Army, but he felt he was a qualified Soldier to stay. He asked that they use their best judgment on his behalf.

h. The immediate commander notified the applicant on 9 December 1977 that he was initiating action to discharge him from the U.S. Army under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, before the expiration of his term of service because of fraudulent entry.

i. The applicant acknowledged receipt of the separation notification on the same date. He was advised of the rights available to him and the effect of waiving his rights. He voluntarily consented to the separation and elected not to submit a statement in his own behalf. He understood he could be advised of the types of discharges which he may be given; he would be advised of the effects of the discharge; he could receive assistance in preparing statements or evidence in his own behalf; if he was considered for a discharge under other than honorable conditions, he would be given an opportunity to request or waive consideration of his case before a board of officers. He elected to submit a statement in his own behalf, however this statement is not contained in the available records.

j. On 9 December 1977, the immediate commander formally recommended the applicant's separation from service under the provisions of AR 635-200, chapter 14. He stated that the applicant concealed his civil convictions when entering the Army, which, if known, would have resulted in rejection. He also stated that request for retention or trial by court-martial was not considered appropriate at the time.

k. A memorandum dated 12 December 1977, signed by the applicant's immediate commander, indicated that company records and the applicant's 201 file had no record of previous convictions.

l. On 12 December 1977, the intermediate commander endorsed the immediate commander's recommendation and stated his enlistment contract should be voided immediately.

m. DA Form 751 (Telephone or Verbal Conversation Record), dated 15 December 1977, shows the applicant's immediate commander spoke with the Office of Court Records in New Jersey. The summary of conversation shows the applicant was convicted in Municipal Court on 7 April 1977 on charges of breaking and entering with intent to steal and fined \$500.00.

n. On 19 December 1977, an investigator from the U.S. Army Signal School, Fort Gordon, GA read the applicant his rights and questioned him about the suspected/accused fraudulent enlistment. The applicant signed the DA Form 3881 (Rights Warning Procedure/Waiver Certificate), understanding his rights and he was willing to discuss the offense under investigation without a lawyer being present.

o. On 22 December 1977, the intermediate commander recommended that the applicant's enlistment contract be voided due to fraudulent enlistment.

p. On 29 December 1977, the separation authority disapproved the recommendation for discharge, and directed that the enlistment would be voided under the provisions of AR 635-200, paragraph 14-4d.

q. The applicant was released on 6 January 1978. His DD Form 214 confirms he was released from military control, under the provisions of AR 635-200, paragraph 14-4d, by reason of misconduct – fraudulent entry. His service was not characterized, and he received Reentry Code 3. This form also shows in:

- Item 9e (Character of Service): NA
- Item 16a (Primary Specialty Number and Title): 31M00, Basic Trainee
- Item 18a (Net Active Service This Period): 0 years, 0 months, and 0 days

- Item 27 (Remarks): Misconduct – fraudulent entry. Time served during period of voided service is not creditable for promotion or longevity. Enlisted member did complete basic combat training.

4. By regulation, fraudulent entry is the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection. A Soldier discharged under the provisions of this chapter will be furnished a DD Form 214 in accordance with paragraph 2-7d, Army Regulation 635-5 and released from custody and control due to void service. Members who were released from custody and control of the Army because of a void or voided enlistment would be furnished a DD Form 214 showing in:

- Item 9e (Character of Service): in all capital letters, NOT APPLICABLE, for release from custody and control of the Army due to voidance of fraudulent enlistments
- Item 9f (Type of Certificate Issued): “none” for voidance due to fraudulent entry
- Item 27 (Remarks): an entry made to indicate that time served during periods of voided service is not creditable for promotion or longevity

5. 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, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant’s contentions, the military record, and regulatory guidance. The Board agreed that the misconduct in which the applicant engaged, indicated intent to deceive. In completing his enlistment form, his answers reflected that he had no involvement with Police or Judicial Authorities. Notwithstanding that his responses would be verified with the FBI and other agencies to determine prior involvement with law enforcement, documentation reflects that he did not reveal his prior convictions. As a result, and, in accordance with applicable regulatory guidance, his immediate commander notified him he was being discharged in accordance with applicable regulatory guidance, properly advised of his rights and separated due to fraudulent enlistment. After due consideration of the applicant’s request, the Board determined the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for relief is not warranted.

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.



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 ABCMR. 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. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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 (Personnel Separations – Enlisted Personnel), in effect at the time (21 November 1977), set forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 stated that separation of individuals for misconduct/fraudulent entry, indicated fraud was the procurement of enlistment through any deliberate material misrepresentation, omission, or concealment which, if known, might have resulted in rejection. The regulation stated an individual who concealed his adjudication as a juvenile offender for a felonious offense would not normally be considered for retention. The evidence must clearly show that the individual gave a negative answer to a specific question as to whether he had a record of being a juvenile offender, or denied that civil custody, as a result of such record, existed at time of entry into the Service.

b. Paragraph 14-4 provided, Fraudulent entry is the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, omission, or concealment which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection. This included all conditions that would have been disqualifying without a waiver. A member who concealed his adjudication as a juvenile offender for a felonious offense normally would not be considered for retention. The evidence must clearly show that the member gave a negative answer to a specific question as to whether he had a record of being a juvenile offender, or denied that civil custody, as a result of such record, existed at time of entry into the Service.

c. Paragraph 14-11 provided for preparation of the DD Form 214 when service was voided. DD Form 214 will be prepared and distributed in accordance with paragraph 2-7d, Army Regulation 635-5 on all individuals released from custody and control due to void service.

d. 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.

4. Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), currently in effect, states in paragraph 7-17, a fraudulent entry is the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection. This includes all disqualifying information requiring a waiver. Soldiers separated under this chapter may be awarded an honorable discharge, a general discharge, or a discharge under other than honorable conditions. If in an entry-level status, the characterization of service will be uncharacterized.

5. Army Regulation 635-5 (Personnel Separations – Separation Documents), in effect at the time, stated on the DD Form 214, include the following information for members who were released from custody and control of the Army because of a void or voided enlistment:

- Item 9e (Character of Service): Enter in all capital letters, NOT APPLICABLE, for release from custody and control of the Army due to voidance of fraudulent enlistments.
- Item 9f (Type of Certificate Issued): Enter “none” for voidance due to fraudulent entry.
- Item 27 (Remarks): An entry will be made to indicate that time served during periods of voided service is not creditable for promotion or longevity.

6. Army Regulation 635-8 (Personnel Separations – Separation Processing and Documents), currently in effect, for a Soldier released from active duty due to a void or voided enlistment, for block 12c (Net Active Service This Period), enter double digit zeros in the year, month, and day blocks.

7. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable; they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

8. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

9. 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.

//NOTHING FOLLOWS//