

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 March 2024

DOCKET NUMBER: AR20230008209

APPLICANT REQUESTS: correction of his record to show:

- recoupment of his Non-Prior Service Enlistment Bonus (NPSEB) was cancelled and refund all monies recouped
- a change of his character of separation to honorable
- change his Reenlistment Eligibility (RE) code to RE-1
- attendance in the Yellow Ribbon Reintegration Program
- restoration of his rank/grade to specialist (SPC)/E-4

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

- DD Form 149 (Application for Correction of Military Record)
- Orders Number 348-072, 14 December 2010
- Orders Number 115-208, 24 April 2012
- Memorandum, Subject: Processing Instructions for Misconduct for Positive Drug Testing, 14 March 2011
- DD Form 2624 (Specimen Custody Document - Drug Testing)
- Memorandum, Subject: Notification of Separation Proceedings Under Army Regulation (AR) 135-178 (Enlisted Administrative Separations), Chapter 12, 24 June 2011
- Memorandum, Subject: Soldier's Response to Notification of Separation Proceedings Under AR 135-178, Chapter 12, 25 June 2011
- DA Form 4856 (Developmental Counseling Form)
- [REDACTED] Army National Guard ([REDACTED] ARNG) Form 102-E (Reduction for Inefficiency), 24 June 2011
- Memorandum, Subject: Notification of Incentive Eligibility Termination, 5 July 2012
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending on 25 April 2012
- Orders Number 136-055, 15 May 2012

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 requests to attend the Yellow Ribbon Reintegration Program (YRRP). Department of Defense Instruction (DoDI) 1342.28 (DoD Yellow Ribbon Reintegration Program) provides eligible individuals access to programs, resources, referrals, and services through YRRP to minimize stress for Service members and their families during all phases of deployment or accumulated deployment of 90 days or more. The services are available before, during, and after activation, mobilization, or deployment. The applicant was released from the Army National Guard on 2 May 2012 and transferred to the U.S. Army Reserve (USAR) Control Group (Annual Training) to complete his statutory service obligation through 25 February 2017. At this time, he is no longer a member of the Military service, and the Board cannot direct his retroactive participation in the YRRP. The applicant's National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows in item 5a (Rank) "SPC" and the applicant does not provide any documentation to the contrary. Additionally, the applicant requests his characterization of service to reflect "Honorable." A review of the applicant's DD Forms 214 and NGB Form 22 all show his characterization of service as "Honorable." His NGB Form 22 also shows his RE code as "1." For the reasons mentioned above the Board will not address those requests. The Board will address the applicant's request to cancel recoupment of his NPSEB.

3. The applicant states:

a. On 28 January 2012 while on Title 32 status, he tested positive for the metabolite consistent with Tetrahydrocannabinol (THC). On 14 March 2011, a memorandum from the substance abuse prevention coordinator was sent to the 45th Infantry Brigade Combat Team (IBCT) Commander outlining processing instructions for misconduct for a positive drug test. The memorandum relied on Army Regulation (AR) 600-85 (The Army Substance Abuse Program), Chapter 12-16a. While the AR was the correct regulation, it should be noted that there is Chapter 12-16a. The memorandum had a suspense date of 14 June 2011. It is important to note that there is a handwritten note on the memorandum which reflected "deployed, Email [sic], to [REDACTED] 16 June 2011. There is no signature reflecting who added the handwritten note.

b. On 6 April 2011, he was activated in support of Operation Enduring Freedom, and was placed on Title 10 status. While in Title 10 status, proceedings to separate were commenced against him for an act that occurred in Title 32 status. On

24 June 2011, in accordance with the provisions of AR 135-178, chapter 12, paragraph 12-1d a separation proceeding was initiated, seeking a dishonorable discharge for him. AR 135-178 does not provide for a Dishonorable Discharge. There are three types of service characterizations in accordance with AR 135-178. They are Honorable, General (Under Honorable Conditions), and Under Other Than Honorable Conditions. A Dishonorable Discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a court martial. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment. Manual for Courts-Martial. If the commander were seeking to use the most severe characterization of service under AR 135-178, Under Other Than Honorable Conditions, then he would be entitled to present his case before an administrative separation board. He further would have been entitled to the advice and assistance of counsel.

c. The separation proceeding that was commenced on 24 June 2011 utilized the procedures for separation under Title 32. He had been placed on Title 10 status for over 60 days. Once he was placed on Title 10 status, any proceeding against him should have been initiated under the active duty regulations, in accordance with AR 600-85. AR 600-85 Chapter 7-9c requires that when a Soldier has had a positive result on a drug test, that there be a mandatory referral to Army Substance Abuse Program (ASAP) counseling staff. He was never referred for the counseling. Nor were any provisions of the procedures found in AR 600-85, Chapter 10-9 followed.

d. Despite the fact that the wrong procedure for separation was followed, the separation proceeding is defective for other reasons. The memorandum to the commander of the 45th IBC T provided that he was to be processed in accordance with the positive drug processing procedures manual no later than the suspense date. The suspense date was 14 June 2011. The memorandum was not even forwarded until 16 June 2011. The Notification of Separation Proceedings was dated 24 June 2011, a full 10 days after the suspense date. On the Soldier's Response to Notification of Separation Proceedings Under AR 135-178, Chapter 12, the date he indicated was that he received response was 25 June 2011. Paragraph 1 of the response provides for an acknowledgement of the receipt of the Notification of Separation Proceedings dated 21 January 2010. There was not a Notification dated 21 January 2010. The only notification was dated 24 June 2011.

e. The response also provided that he had the opportunity to consult with an attorney and provided a signature line to be signed by the Judge Advocate General Officer with which he consulted. However, the Officer, Captain [REDACTED] who had initiated the separation, and proceeding with two counseling statements at the same time, signed the document as an attorney for him, when in fact he was only his company commander. Obviously, this was error.

f. He was discharged from the [REDACTED] ARNG on completion of his deployment on 3 May 2012. He was denied attendance to the Yellow Ribbon Reintegration Program. Further, a recoupment for his enlistment bonus in the amount of \$9,444.00 was initiated at the time of his discharge.

g. He should have been allowed to attend the Post-Deployment Yellow Ribbon Reintegration Program. As provided for in the Department of Defense Instruction (DoDI) Number 1342.28 (DoD Yellow Ribbon Reintegration Program) that "it is DoD policy that the National Guard and Reserve Component members and their families shall have access to programs, resources, referral, and services to minimize stress on families during all phases of deployment or accumulated deployment day of 90 days or as Services direct. That provision is a mandatory "shall" not a permissive "may." He was denied a valuable service after completion of his deployment.

h. As previously provided, an action to reduce him was initiated on 24 June 2011. The reduction utilized an unauthorized [REDACTED] ARNG Form 102-E which was not appropriate for a Soldier on Title 10 Orders. Further, it cited Chapter 7 AR 600-8-19 (Enlisted Promotions and Reductions) as the authority for the reduction, and the one positive test for marijuana for the basis for reduction. AR 600-8-19, chapter 7 does not address reductions for inefficiency. However, chapter 10-5 and 10-6 do address those reductions. A reduction for inefficiency will not be used to reduce a Soldier for a single act of misconduct. Therefore, to initiate an action to reduce a Soldier for inefficiency based on one positive drug test is error. It appears that he mobilized and deployed as a specialist (SPC)/E-4 and was released as a SPC, so it is not clear as to whether he was actually reduced. However, there was not any documentation indicating that the reduction was actually withdrawn.

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

a. On 26 February 2009, the applicant enlisted in the [REDACTED] ARNG at the rank/grade of private (PVT/E-1 for a period of eight years in military occupational specialty 13B (Cannon Crewmember). In conjunction with this enlistment National Guard Bureau (NGB) Form 60-7-1-R-E ((Annex E to DD 4 NPSEB Addendum ARNG) was completed showing he was entitled to a non-prior service non-critical skill bonus 50/50 payment in MOS 13B. Section III (Payments) shows he would receive a \$20,000.00 bonus, and he would receive 50 percent when he completed Initial Active Duty for Training (IADT), and was awarded the MOS for which he enlisted, the second 50 percent would be paid on the 36 month anniversary. Section VI (Termination with Recoupment) states the bonus would be terminated if he separated from the ARNG for any reason unless due to death, injury, illness, or other impairment not the result of his own misconduct.

b. On 2 June 2009, the applicant entered active duty for training.

c. On 27 September 2009, the applicant was honorably released from active duty by reason of completion of required active service and was awarded MOS 13B. A DD Form 214 shows the following:

- Item 4a (Grade, Rate or Rank) "PV2"
- Item 24 (Character of Service) shows "Honorable"
- Item 25 (Separation Authority) AR 635-200 (Active Duty Enlisted Administrative Separations), chapter 4
- Item 27 (Reentry Code) "NA"

d. DA Form 4187 (Personnel Action), dated 5 December 2010, shows the applicant was advanced to the rank/grade of SPC/E-4, effective 2 December 2010, under the authority of AR 600-8-19, chapter 2, paragraph 2-3h(4)(c).

e. On 6 April 2011, the applicant entered active duty in support of Operation Enduring Freedom.

f. On 3 April 2012, Orders Number 094-0053 issued by Camp Shelby Joint Forces Training Center, released the applicant from active duty, effective 25 April 2012.

g. On 25 April 2012, the applicant was honorably released from active duty by reason of completion of required active service and returned to his ARNG unit. DD Form 214 shows the following:

- Item 4a; "SPC"
- Item 12i (Effective Date of Pat Grade) 2 December 2010
- Item 24; "Honorable"
- Item 25; AR 635-200, chapter 4
- Item 27 (Reentry Code) "NA"

h. On 11 May 2012, the [REDACTED] ARNG substance abuse prevention coordinator notified the Commander, 45th IBC, that the Executive Summary (EXSUM) and findings for the applicant was completed. The EXSUM stated the applicant's pending positive drug packet was complete. The applicant would be discharged from the [REDACTED] ARNG, effective 3 May 2012. The EXSUM shows on 28 January 2011, the applicant tested positive for THC and on 24 June 2011, the commander issued the applicant a notification of separation processing, rights and counseling. The applicant agreed with the charges and elected to waive his rights for legal counsel. The applicant did not meet with JAG and did not complete a substance abuse treatment program. On 3 May 2012, the State Adjutant General endorsed the EXSUM based on the summary of findings and the recommendation of the applicant's Battalion Commander to separate him from the [REDACTED] ARNG with a Under Honorable Conditions (General) characterization of service and

RE Code 3. Additionally, the applicant requested a voluntary discharge from the [REDACTED] ARNG.

i. On 2 May 2012, the applicant was "honorably" released from the ARNG and transferred to the U.S. Army Reserve (USAR) Control Group (Annual Training) under the provisions of National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management) individual request of the Soldier not to be discharged from the Reserve of the Army status in order to become a member of the Army Reserve, Individual Ready Reserve. NGB Form 22 (Report of Separation and Record of Service) shows:

- Item 5a (Rank) "SPC
- Item 6 (Date of Rank) 2 December 2010
- Item 18 (Remarks) "individual assigned to USAR Control Group (Annual Training) for completion of 4 years, 9 months, and 24 days of statutory obligation; enlistment bonus date terminated 3 May 2012; reason for termination: separation with recoupment
- Item 24 (Character of Service) "Honorable"
- Item 26 (Reenlistment Eligibility) "RE-1"

j. On 15 May 2012, Orders Number 136-055 issued by the Joint Force Headquarters, discharged the applicant from the ARNG, under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), effective 3 May 2012, with a Under Honorable Conditions (General) characterization of service and a RE-3 Code. Selected Reserve Incentive Program (SRIP) shows "yes", termination "no."

k. On 18 June 2013, Orders Number 169-033 issued by the Joint Force Headquarters, discharged the applicant from the ARNG in the rank/grade of SPC/E-4, under the provisions of NGR 600-200, effective 2 May 2012, with a Honorable characterization of service and a RE-1 Code. SRIP shows "yes", termination "no."

5. The applicant provides:

a. Orders Number 348-072 showing the applicant was ordered to active duty in support of Operation Enduring Freedom.

b. Orders Number 115-208 showing Orders Number 348-072 was amended show his order to active duty was amended.

c. Memorandum, Subject: Processing Instructions for Misconduct for Positive Drug Testing, dated 14 March 2011, showing the [REDACTED] ARNG substance abuse prevention coordinator notified the Commander, 45th IBCT that the applicant tested positive for

THC and the commander must process the applicant for discharge in accordance with AR 600-85, paragraph 12-16a.

d. DD Form 2624 showing the applicant's submitted urine specimen.

e. Memorandum, Subject: Notification of Separation Proceedings Under AR 135-178, Chapter 12, dated 24 June 2011, showing the applicant's immediate commander initiated separation actions against the applicant under the provisions of AR 135-178, chapter 12, paragraph 12-1d for testing positive for marijuana. The immediate commander recommended a dishonorable discharge. The applicant was advised of his right to counsel and his rights. The initiation is void of the applicant's endorsement.

f. Memorandum, Subject: Soldier's Response to Notification of Separation Proceedings Under AR 135-178, Chapter 12, dated 25 June 2011, showing the applicant acknowledged receipt of the notification of separation proceedings and waived his right to counsel and to submit written statements on his behalf.

g. DA Forms 4856 wherein the applicant was counseled by his immediate commander for a positive urine sample (THC). The applicant was counseled that he must attend and successfully complete a State certified substance abuse course to be considered for retention. The applicant agreed with the counseling's.

h. ■■■ ARNG Form 102-E showing the applicant's immediate commander initiated action for a reduction in rank under the provisions of AR 600-8-19, chapter 7, due to testing positive for marijuana (THC).

i. Memorandum, Subject: Notification of Incentive Eligibility Termination, dated 5 July 2012, wherein the State Incentive Manager notified the applicant that his NPSEB would be recouped due to alcohol and drug abuse, and it would be forwarded for debt and collection in the amount of \$9,444.44.

6. On 12 February 2024, the Chief, Special Actions Branch, NGB, provided an advisory opinion and stated:

a. The applicant states that he was discharged from the ■■■ ARNG with a dishonorable characterization and RE-3 Code. He also claims that he was not allowed access to the YRRP, and his bonus was stopped and recouped. He also claims that his reduction in rank due to inefficiency was incorrect. He requests correction of his discharge paperwork to reflect "Honorable" and a RE-1 Code and cancellation of his bonus recoupment.

b. The applicant's records show that he was discharged from the ■■■ ARNG on

3 May 2012 with a RE-3 Code. This order was revoked on 18 June 2013. A new discharge order was issued on the same day with the type of discharge "Honorable" and RE-1 Code. According to the applicant, he was denied attendance to the YRRP. There is no further argument made on this issue. He may or may not have had access to this program, but there is no solution to this issue that the Army Review Boards Agency or anyone else can provide. Additionally, the applicant was never reduced in rank. His NGB Form 22 and orders show that he was discharged as a SPC/E4.

c. According to his NPSEB addendum, he was eligible for a total bonus of \$20,000.00. He received his first bonus payment of 50 percent when he completed IADT and became Duty MOS Qualified. His second payment of the remaining 50 percent paid on the 36th month anniversary of his date of enlistment. His 36th month anniversary was 26 February 2012. Section VI of his bonus addendum states that his bonus eligibility will be terminated if he separates from the ARNG for any reason unless due to death, injury, illness, or other impairment not the result of his own misconduct.

d. Based on the applicant's records and the evidence available, it is the recommendation of this office that the applicant's request be disapproved. The applicant was issued new discharge orders which reflect the changes he requested. There is no way for him to go back to use the YRRP, and there is no evidence of him being barred from using this resource. The applicant was never reduced in rank. The bonus recoupment is correct since he was separated from the [REDACTED] ARNG for his own misconduct. There is no injustice to be corrected in his case.

e. [REDACTED] Army National Guard concurs with this recommendation.

7. On 13 February 2024, the applicant was provided with a copy of the advisory for comment or rebuttal. He did not respond.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the advisory official's conclusion that the evidence confirms the applicant violated his NPSEB contract based on the misconduct that led to his separation prior to fulfilling the terms of the contract. Based on a preponderance of the evidence, the Board determined the cancellation and recoupment of his NPSEB 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 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.

6/25/2024

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 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. Title 10, USC, section 1552 states, the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

3. AR 15-185 (ABCMR) states in paragraph 2-9, 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.
4. AR 600-85 (The Army Substance Abuse Program) paragraph 4-2 states Soldiers who test positive for illicit drugs for the first time will be evaluated for dependency, disciplined as appropriate, and processed for separation within 30 calendar days of the company commander receiving notification of the positive result. Soldiers diagnosed as drug dependent will be offered rehabilitation prior to separation.
5. AR 600-4 (Remission or Cancellation of Indebtedness) in accordance with the authority of Title 10 USC, section 4837, the Secretary of the Army may remit or cancel a Soldier's debt to the U.S. Army if such action is in the best interests of the United States. Indebtedness to the U.S. Army that may not be canceled under Title 10 USC, section 4837 when the debt is incurred while not on active duty or in an active status.
6. Department of Defense Instruction 1205.21 (Reserve Component Incentive Programs Procedures) paragraph 6.2 states, as a condition of the receipt of an incentive covered by this Instruction, each recipient shall be required to sign a written agreement stating that the member has been advised of and understands the conditions under which continued entitlement to unpaid incentive amounts shall be terminated and which advance payments may be recouped. That agreement shall clearly specify the terms of the Reserve Service commitment that authorizes the payment of the incentive to the member.

//NOTHING FOLLOWS//