

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 May 2024

DOCKET NUMBER: AR20230008500

APPLICANT REQUESTS:

- Upgrade of his under other than honorable conditions to honorable
- Change the narrative reason for separation from misconduct to retirement

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 29 January 2015
- Multiple self-authored statements and arguments
- Brief presenting arguments for issues
- Excerpt "The Bill of Rights: A User's Guide (4th Ed)"
- Noncommissioned Officer (NCO) Evaluation Reports and Summary of Reports
- Service Schools and Summary of Service Schools Academic Reports
- Awards and Decoration: orders, certificates, and related documents
- Extract of Army Regulation (AR) 635-200 (Personnel Separation)
- Extract of Title 10, U.S. Code, sections 7314 and 7325
- Separation Packet with notification, acknowledgment, initiation, chain of command recommendation, and separation authority decision
- Admin separation board findings and recommendations, and applicant's rebuttal statement
- Plea Agreement and Civilian Conviction
- FLAG and Confinement Duty Status
- Denial of Request for Retirement
- Denial of Conditional Waiver
- Enlisted Record Brief
- Enlistment Record, 19 March 1999
- Separation Orders, 29 January 2015
- Previous application to the Army Discharge Review Board and Return without action letter
- Previous letters to the Army Discharge Review Board
- Plea Agreement, United States of America v. [Applicant] Case [Number]

- Transcript of Change of Plea, United States of America v. [Applicant] Docket [Number]
- USA Today Newspaper Article, "General Loses Post in Latest Military Misconduct Case"
- USA Today Newspaper Article, "Army's Top Brass Gave General's Behavior A Pass"
- USA Today Newspaper Article, "Army Strips Star from General in Text Scandal"
- USA Today Newspaper Article, "Pentagon Finds 500 Cases of Military Misconduct"
- USA Today Newspaper Article, "Ethical Complaints Rise Against Military Brass"
- WTVD-TV, ABC Channel 11, [City], [State] News Report, "Soldier's Jail Sentence Reduced to One Month in Fatal DWI Hit and Run Case"
- Certified Mail receipts and/or envelopes

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 after serving honorably and faithfully in the Army for over 23 years, he was arrested and incarcerated by civilian authorities for Production of Child Pornography. He was not court-martialed. He was prosecuted in United States District Court. Following his incarceration, the Army separated him via Chapter 14-5, Army Regulation 635-200 (Personnel Separations) While not trying to deny, detract from, or dismiss the seriousness of his criminal offense, it was a single, isolated event in what, at the time of his final separation, was ultimately nearly 26 years of service, and for which he was punished by the civilian authorities.

a. He believes his discharge was inequitable for the following reasons:

(1) He was deprived of retirement pay and benefits without proper due process of law in violation of the 5th Amendment to the Constitution because the notification given for separation stated the reason for separation was his incarceration by civilian authorities. However, the separation board did not, in fact, focus on his incarceration but on the facts of his crime. Therefore, while the reason for separation given in the Notification of Intent to Separate him may have been valid, the separation board proceedings were invalid because they did not focus on the reasons stated in the notification.

(2) He is potentially placed in double jeopardy - also in violation of the 5th Amendment of the Constitution - because the separation board focused on the facts of

his crime, not on his incarceration, in effect prosecuting and punishing him, through the denial of retirement pay and benefits, a second time for the same crime.

(3) He is deprived of retirement pay and benefits without a proper hearing in violation of the 5th and 7th Amendments of the Constitution because the three voting member separation board does not meet the federal civil trial requirement of a six person jury, nor the federal criminal trial requirement of a 12 person jury.

(4) Separating him via Chapter 14-5 imposes an excessive fine through the loss of over an estimated one million dollars in retirement pay and benefits over the course of 30 years of expected remaining life, in violation of the 8th Amendment of the Constitution's prohibition of excessive fines.

(5) Separating him via Chapter 14-5 discriminates against him as an enlisted Soldier because he is being separated without retirement pay or benefits while senior officers in similar situations - e.g., general officers caught in cases of sexual misconduct and misappropriation of government resources – are retired with pay and benefits.

b. The attached brief documents and expounds on the specific details of his case, how it was handled, his arguments and supporting information and provides potential alternatives to separation and retirement options which he feels are more equitable, fair, and appropriate, than completely stripping him of all retirement pay and benefits. He asks the Board to consider and respond to each of the above issues and direct that his discharge status be changed to "RETIRED" with a retirement rank and characterization of service which the Board deems appropriate.

3. Review of the applicant's service records shows:

a. The applicant enlisted in the Regular Army on 3 February 1989. He held military occupational specialties 13D, Field Artillery Automated Tactical Data System Specialist and 35X, Intelligence Analyst.

b. He served through multiple reenlistments, in a variety of stateside or overseas assignments, including United Kingdom, Germany, Bosnia, and Iraq. He was promoted to master sergeant (MSG)/E-8 in April 2006.

c. He attended several service schools, received various awards and decorations as well as multiple successful NCO Evaluating Reports. He was last assigned to the Special Operations Command Central at MacDill Air Force Base, FL as the Intelligence Directorate NCO In Charge.

d. On 30 May 2012, the applicant was arrested by Federal Bureau of Investigation (FBI) agents on Production of Child Pornography charges. On 12 April 2010, an

undercover agent posing as a 13-year-old girl was contacted via email by the applicant. They engaged in sexually explicit language during conversation, he used a webcam to expose his pen** to, stimulate and ejaculate himself to whom he thought was a 13-year-old girl. The undercover agent continued the conversations from April 2010 to February 2012 and this was not an isolated incident. There were several emails and webcams over this period of time. He changed his email twice and continued to engage in conversation again with the undercover agent who he then thought was now 15-year-old minor from 29 February 2012 through 12 March 2012. He had asked the underage girl, on a separate occasion, to send him nude photos of herself.

c. On 7 February 2013, he was charged with from on or about April 10, 2010, through May 30, 2012, in [Name] County, in the Middle District of [State Name], did transport child pornography, attempt to produce child pornography, and transfer obscene material to a minor under age 16, in violation of Title 18, United States Code, Sections 2252(a)(1), 2251(a), and 1470.

d. The applicant pled guilty to the Count One, Production of Child Pornography, in violation of 18 U.S.C. § 2251. Count One is punishable by a mandatory minimum term of imprisonment of fifteen (15) years up to thirty (30) years, a fine of \$250,000, a term of supervised release of at least five (5) years, and a special assessment of \$100, said special assessment to be due on the date of sentencing.

e. On 13 July 2013, the applicant's commander (U.S. Army Element Commander) notified the applicant that under the provisions of AR 635-200, Chapter 14-5, the commander is initiating action to separate him for Conviction by Civil Court. The reasons for the proposed action are: The applicant was convicted on 7 May 2013, in the United States District Court, Middle District of [State], [City] Division for violating 18 U.S.C. § 2251(a) and 18 U.S.C. § 2251(e), on One Count of Production of Child Pornography between October 2011 and January 2012 and were sentenced to 15 years in federal prison, to forfeit his computer equipment, pay \$300 restitution to the victim and register as a sex offender. The commander recommended the applicant receive an Other Than Honorable Conditions Discharge.

f. On 12 August 2013, the applicant submitted a conditional waiver. He indicated he had been advised by his consulting counsel of the basis for the contemplated action to separate him for Conviction by Civil Court AR 635-200, Chapter 14-5, and its effects; of the rights available to him; and of the effect of any action taken by him in waiving his rights. He understood that he is entitled to have his case considered by an administrative separation board because he has more than six years of active-duty time and he has been recommended to receive an Other Than Honorable Conditions Discharge. He stated:

(1) Prior to completing this form, he was afforded the opportunity to consult with consulting counsel, and to consider whether or not to submit a conditional waiver. He is completely satisfied with the legal advice counsel has provided him.

(2) He hereby voluntarily waived consideration of his case by an administrative separation board contingent upon him receiving a characterization of service or description of separation no less favorable than a general, under honorable conditions.

(3) He understood that he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him. He further understood that as the result of issuance of a discharge under other than honorable conditions he may be ineligible for many or all benefits as a veteran under both Federal and State laws and that he may expect to encounter substantial prejudice in civilian life.

(4) He provided a personal statement in which he stated while he understands why his separation from the military is required, he requests to be allowed to retire in lieu of administrative separation. While his actions are reprehensible and inexcusable, he served honorably in the military for over 20 years before his misconduct occurred. He enclosed documentation regarding his achievements and contributions throughout his 24-year career. He makes this request in the hope that his wife and three children will be able to reap some benefits from his military service, as they have supported him throughout his career. Allowing him to retire will provide them some financial stability, access to healthcare, and other benefits to which dependents are entitled. If retirement is not permissible, he requests that he be allowed an Honorable discharge due to his 20+ years of honorable service.

g. On 18 October 2013, the applicant's senior commander recommended the applicant be referred to an administrative separation board to determine whether or not he should be discharged from the Army prior to the expiration of current term of service.

h. On 3 November 2013, the Commanding General, Special Operations Command reviewed the applicant's request for conditional waiver and supporting matters, dated 12 August 2013, wherein he voluntarily waived consideration of his administrative separation board, contingent upon receiving a characterization of service or description of separation no less favorable than a General, under honorable conditions discharge. After careful consideration of his request and support matters, his request is disapproved. His case will be heard by an administrative separation board.

i. On 19 December 2013, an Administrative Separation Board was convened in accordance with AR 635-200, to determine if [Applicant] should be discharged from the service prior to the expiration of his current term of service.

(1) the administrative separation board, having carefully considered the evidence before it, finds the allegation of conviction by civilian court for violating 18 U.S.C. § 2251(a) and 18 U.S.C § 2251(e) on one count of production of child pornography between October 2011 and January 2012 in the notification of proposed separation is supported by a preponderance of the evidence. The finding warrant separation.

(2) In view of the above findings, the board recommends that the applicant be separated from the United States Army with a characterization of service of Under Other Than Honorable Conditions.

j. On 20 December 2013, a military attorney reviewed the administrative separation board proceedings pertaining to the applicant and found the board proceedings are legally sufficient. Specifically, he found the proceedings comply with the requirements of AR 635-200 and AR 15-6, sufficient evidence exists to support the board's findings, and the board's recommendations are consistent with their findings. The attorney did not find any legally errors in the record.

k. On 6 January 2014, the Commanding General, Special Operations Command Central recommended approval of the administrative separation board's findings and recommendations that [Applicant] be separated from active service for conviction by civilian court and that he be issued an under other than honorable conditions discharge.

l. On 24 January 2014, the U.S. Army Human Resources Command (HRC) denied the applicant's request for retirement. The Soldier currently has an adverse action flag pending administrative discharge or separation. If the separation authority recommends separation this action should be included in the separation packet forwarded to HRC for staffing to HQDA.

m. On 27 January 2015, the Assistant Secretary of the Army (Manpower and Reserve Affairs (ASA (M&RA)) directed that the applicant be separated under AR 635 200, paragraph 14-5, with an Under Other Than Honorable conditions characterization of service. In accordance with AR 635-200, paragraph 14-4b, the ASA (M&RA) directed that the applicant be reduced to Private (E-1) and separated with a Separation Program Designator Code (SPD) of JKB and a Reenlistment Eligibility Code (RE) of RE-4.

o. On 29 January 2015, the applicant was accordingly discharged. His DD Form 214 shows he was discharged in accordance with chapter 14-12 of AR 635-200 with an under other than honorable conditions discharge, with Separation Code JKB and Reentry Code 4. He completed 25 years, 11 months, and 27 days of active service.

4. In reaching its determination, the Board can consider the applicant’s petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant’s petition and available military records, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the egregious misconduct. The Board noted the applicant provided no post service achievements or character letters of support for the Board to consider as a clemency determination.

2. The Board determined based on the preponderance of evidence the applicant’s narrative reason was not in error or unjust. The Board agreed the applicant has not demonstrated with substantiating evidence an error or injustice occurred, warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a honorable. However, during deliberation, the Board determined the applicant had a prior period of honorable service which is not currently reflected on his DD Form 214 and recommended that change be completed to show his period of honorable service more accurately by granting partial relief.

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:

1. The Board determined the evidence presented is 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 amending the DD Form 214 for the period ending 29 January 2015 by adding the following entries in item 18 (Remarks):

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE SERVICE FROM 19890203 UNTIL 1999031919

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to an upgrade of the applicant's under other than honorable conditions to honorable and change of the narrative reason for separation from misconduct to retirement.



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 (AR) 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a states 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 that 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 12 sets policies and procedures for voluntary retirement of Soldiers because of length of service and governs the retirement of Soldiers who are retiring in their enlisted status. Soldiers of the Regular Army must be on active duty when they retire. Retirement normally will be in the regular or reserve grade the Soldier holds on the date of retirement.

(1) Paragraph 12-4. Twenty-year retirement law (10 USC 3914). A Soldier who has completed 20 but less than 30 years of Active Federal Service in the U.S. Armed Forces may be retired at his or her request (see para 12-14f). The Soldier must have completed all required service obligations at the time of retirement.

(2) Paragraph 12-5. A Regular Army Soldier who has completed at least 30 years of active Federal service in the U.S. Armed Forces will, upon request, be placed on the retired list.

(3) Paragraph 12-7: Soldiers who have completed 20 but less than 30 years of AFS and who have completed all required service obligations are eligible, but not entitled, to retire upon request. Soldiers who are under suspension of favorable personnel action per AR 600-82 are not precluded from submitting applications for retirement. Requests for retirement will be considered on a case-by-case basis by the local retirement approval authority.

d. Chapter 14 establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

(1) Paragraph 14-3. Characterization of service or description of separation. 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 such is merited by the Soldier's overall record.

(2) Paragraph 14-5. Conditions that subject a Soldier to discharge and reduction in grade. A Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the following conditions is present. This includes similar adjudication in juvenile

proceedings: (a) A punitive discharge authorized for the same or a closely related offense under the Manual of Court-Martial 2002, as amended, and (b) The sentence by civil authorities includes confinement for 6 months or more, without regard to suspension or probation. Adjudication in juvenile proceedings includes adjudication as a juvenile delinquent, wayward minor, or youthful offender. Initiation of separation action is not mandatory. Although the conditions established, above, are present, the immediate commander must also consider whether the specific circumstances of the offense warrant separation. If the immediate commander initiates separation action, the case will be processed through the chain of command to the separation authority for appropriate action. A Soldier convicted by a civil court or adjudged a juvenile offender by a civil court will be reduced or considered for reduction. (See AR 600–8–19, Enlisted Promotions or Reductions.)

(3) Paragraph 14-6: A Soldier will be considered as having been convicted or adjudged a juvenile offender even though an appeal is pending or is later filed. A Soldier subject to discharge under this regulation will be considered and processed for discharge even though he/she has filed an appeal or has stated his/her intention to do so. However, execution of the approved discharge will be withheld until one of the following circumstances occurs, whichever is earlier: (a) The Soldier has indicated, in writing, that he/she does not intend to appeal the conviction or adjudication as a juvenile offender; (b) The time in which an appeal may be made has expired; or (c) The Soldier's current term of service, as adjusted, expires.

3. 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. 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. 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.

//NOTHING FOLLOWS//