

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 November 2024

DOCKET NUMBER: AR20230008526

APPLICANT REQUESTS: the applicant defers to counsel for submission of his request, statement, and evidence.

- reinstatement in the Regular Army, effective 1 May 2020
- backpay and allowances to which applicant is entitled thru 20 November 2022
- in effect, correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show he was discharged with an honorable discharge
- all matters relating to the applicant 's separation proceedings be expunged from his record

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- NGB Form 22 (National Guard Report of Separation and Record of Service)
- Drug Testing Program Testing Register, 10 December 2019
- Urinalysis (UA) Results Report, 31 December 2019
- Memorandum subject: Lab-Confirmed Positive UA, 2 January 2020
- DA Form 4856 (Developmental Counseling Form), 6 January 2020
- DD Form 2627 (Report of Medical Assessment), 30 January 2020
- DA Form 3822 (Report of Mental Status Evaluation), 4 February 2020
- Memorandum subject: Separation Under Army Regulation 635–200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c (2), Misconduct -Abuse of Illegal Drugs, 7 February 2020
- Memorandum subject: Election of Rights Regarding Separation, 14 April 2020
- Memorandum subject: Request for an Administrative Separation Board, 14 April 2020
- Memorandum subject: Commander's Report - Proposed Separation, 14 April 2020
- An email between legal personnel
- Battalion commander's recommendation, 15 April 2020
- Separation approval, 16 April 2020 and DD Form 214
- Privacy act statement

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. Counsel states in his legal brief, which is available in its entirety for the Board's review:

a. He requests the correction of the applicant's records, and for him to be returned to active duty from the date of separation. Additionally, for the Defense Finance and Accounting Service (DFAS) to be tasked by ABCMR to audit the applicant's account to determine all pay and allowances due as a result of such reinstatement to active service until the date on which his term of enlistment would otherwise have expired had he not been improperly discharged. Also, for all matters relating to the applicant's improper separation proceedings to be expunged from his record, as he was never afforded the opportunity to argue his case before an administrative separation board.

b. The record shows the proper discharge and separation procedures were not followed in his case resulting in a prejudicial error rendering the discharge improper. The discharge was not consistent with the procedural and substantive requirements of the regulation, was not within the discretion of the separation authority, and the applicant was not provided full administrative due process.

(1) The applicant was eligible to request an administrative separation board because he had over six years of qualifying active and reserve service at the time his separation was initiated.

(2) The separation authority arbitrarily, capriciously and, above all illegally, directed the separation of the applicant while denying him his right to an administrative separation board and due process under Army Regulation 635-200.

c. The separation was clearly arbitrary, improper, and unlawful. Per federal court rulings, military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. He request's equitable relief.

3. Counsel provides an email, which shows legal personnel advised the applicant's unit he was not eligible to request an administrative separation board, as he did not have the minimum time in service, which was required to make this election.

4. Regarding the discharge upgrade, the applicant was separated in April 2020. He currently has a petition before the Army Discharge Review Board (ADRB) regarding his character of service, reason, authority and associated codes. Since the ADRB has not rendered a decision on his case, the ABCMR cannot address his discharge upgrade yet. Therefore, this issue will not be discussed further in this Record of proceedings.

5. The applicant's service record reflects the following:

a. The applicant has prior enlisted time with the Army National Guard (ARNG) from 16 June 2014 – 2 February 2016; Honorable.

b. He enlisted in the Regular Army on 3 February 2016, followed by one reenlistment, and has continuous honorable active service from 3 February 2016 to 20 November 2017.

c. He served in Afghanistan from 21 June 2016 to 10 December 2016.

d. On 21 November 2017, the applicant completed his reenlistment in the Regular Army for 5 years as a specialist, SPC (E-4), with 3 years, 9 months, and 29 days of prior inactive and active service. The Enlisted Record Brief provides on 1 March 2019, shows he was promoted to sergeant.

e. On 10 December 2019, the applicant's unit administered a random UA, in which he was selected to provide a urine sample. On 31 December 2019, the UA results show the applicant's sample rendered positive results for cocaine. In a memorandum subject: Lab-Confirmed Positive UA, 2 January 2020, his command was notified of the positive results.

f. On 2 January 2020, The Army Substance Abuse Program (ASAP) Coordinator, informed the command of the applicant's positive urinalysis for cocaine and provided the required actions in accordance with Army Regulation (AR) 600-85, such as notifying local CID, refer the Soldier to Behavioral Health for evaluation/assessment within five duty days; initiating their FLAG; and to comply with regulatory guidance AR 635-200 (Active Duty Enlisted Administrative Separations).

g. DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)), 14 January 2020, reflects the applicant accepted nonjudicial punishment (NJP) for on or about 10 November 2019 and on or about 10 December 2019, wrongfully use cocaine. His punishment included reduction to the rank/grade of specialist (SPC)/E-4.

h. DA Form 3822-R (Report of Mental Status Evaluation), dated 2 February 2020, shows he underwent a mental status evaluation, as part of his separation for

misconduct. He was currently engaged in Addiction Medicine Partial Hospitalization Program (AMPHP), and should continue treatment. He did not require any duty limitations. His behavioral health condition was not a mitigating factor for his actions. His behavior and impulsivity were both normal. His cognition and perceptions were not impaired. He could understand and participate in the administrative proceedings, as he could distinguish right from wrong.

i. The company commander notified the applicant of their intent to initiate separation proceedings under the provisions of AR 635-200, Chapter 14-12c (2), Misconduct (Drug Abuse), for wrongful use of cocaine. The commander recommended a General (Under Honorable Conditions) characterization of service. The applicant acknowledged receipt of their separation notice. After consulting with legal counsel on 14 April 2020, for his separation action and its effects of the rights available to him, and the effect of any action taken by him in waiving his rights, the applicant acknowledged:

- he was entitled to consideration of his case by an administrative separation board
- he could submit a conditional waiver of his right to have his case considered by an administrative separation board
- he was entitled to, and requested a personal appearance before an administrative separation board
- he requested to consult with consulting counsel and to be represented by military counsel and/or civilian counsel at no expense to the government
- that if he failed to appear before the administrative separation board, it would constitute as a waiver of his rights
- he was advised he could submit any statements he desired in his own behalf, he decided not to do so
- he could be ineligible for many, or all benefits administered by the VA
- he could be deprived of many, or all Army benefits and he could be ineligible for many or all benefits as a veteran under both Federal and State laws
- he could expect to encounter substantial prejudice in civilian life by reason of a general under honorable conditions discharge

j. On 3 April 2020, the Brigade Judge Advocate, sent an email to defense counsel and requested the regulatory authority, they relied upon to assert that the applicant was entitled to an administrative separation board. Specifically, backdating the applicant's BASD (basic active service date) to their entry date in the National Guard, as opposed to active duty, which is listed on their ERB. The BJA further advised when returning actions, defense counsel should always cite the authority, which they relied on or contact an attorney within the brigade, should they have an inquiry

k. In a memorandum subject: Request for an Administrative Separation Board, 14 April 2020, that is available in its entirety for the Board's review, shows the defense counsel states the applicant has over 8 years of qualifying creditable service and is entitled to an administrative separation board. She further explains that without allowing him the option of election to appear before an administrative separation board, the initiated separation under the provisions of Army Regulation 635–200, Chapter 14-12c (2), is unlawful.

l. On 14 April 2020, his commanding officer recommended the applicant be discharged prior to his expiration of his term of service (ETS) from the Army under the provisions of Army Regulation 635–200, Chapter 14-12c (2), for Misconduct - Abuse of Illegal Drugs.

m. On 15 April 2020, the battalion commander recommended that the applicant be discharged prior to his ETS, under the provisions of AR 635-200, 14-12c (2), and issued a general discharge.

n. On 16 April 2020, the separation authority approved the applicant's discharge prior to his ETS and directed the issuance of a general discharge.

o. His DD Form 214 for the period ending 30 April 2020, shows he was discharged pursuant to AR 635-200, Chapter 14-12c (2) with a general discharge, due to Misconduct (Drug Abuse). He received a separation code of "JKK" and a reentry code of "RE-4". He completed 4 years, 2 months, and 28 days of active service and 6 months and 20 days of foreign service (Afghanistan). His grade at the time of discharge was SPC. He was awarded the following awards:

- Army Commendation Medal
- Army Achievement Medal (fourth award)
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Afghanistan Campaign Medal with one bronze service star
- Armed Forces Service Medal
- Noncommissioned Officer Professional Development Ribbon
- North Atlantic Treaty Organization
- Army Service Ribbon

6. On 11 May 2023, he petitioned the Army Discharge Review Board request to upgrade his general discharge to honorable, a narrative reason change, and changes to their separation and reentry codes. His request is pending.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant requests an honorable discharge, reinstatement, and back pay. The Board noted that since the applicant currently has a petition before the ADRB regarding his discharge upgrade and since the decision by the ADRB impacts whether the applicant should or should not be reinstated, the Board determined addressing this issue is premature. The Board recommends the applicant exhausts his administrative remedies before addressing his issues through the ABCMR.

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.

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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 (Armed Forces), 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 635–200 (Active Duty Enlisted Administrative Separations), sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. Honorable discharge. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. General discharge. 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty (AD).

c. Chapter 14 -12c (2) (Separation for Misconduct), 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. Commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial (MCM). Abuse of illegal drugs is serious misconduct.

d. The Soldier will be further advised of the right to a hearing before an administrative separation board if he/she had 6 or more years of total active and reserve service on the date of initiation of recommendation for separation. This includes creditable service in any U.S. military component, for example, RA, ARNGUS, USAR (including IRR and Delayed Entry Program), USN, USAF, and so forth.

3. Army Regulation 600-37 (Unfavorable Information), sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR). The authority to adjudicate appeals for Article 15 removal, rests with the ABCMR, under Army Regulation 15-185.
4. Army Regulation 15-185 (ABCMR), states the Army, by law, may pay claims for amounts due to applicants as a result of correction of military records. The ABCMR will furnish the Defense Finance and Accounting Service (DFAS) copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant and settle claims on the basis of the corrected military record. The applicant's acceptance of a settlement fully satisfies the claim concerned.
5. Army Regulation 635-5-1 (Separation Program Designator Codes), states that the Separation Program Designator (SPD) codes are three-character alphabetic combinations which identify reasons for, and types of separation from active duty. SPD code "JKK" and RE code 4 are the appropriate codes to assign to enlisted Soldiers who are administratively discharged under the provisions of Army Regulation 635-200, Chapter 14 -12c (2), based on Misconduct (drug abuse).
6. 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 personnel who have completed their obligated term of active service and are considered qualified to reenter the U.S. Army if all other criteria are met
 - RE code "2" Applies to persons not eligible for immediate reenlistment
 - RE code "3" applies to personnel who are not considered fully qualified for reentry or continuous service at time of separation, but whose disqualification is waivable. They are ineligible unless a waiver is granted
 - RE code "4" applies to personnel separated from last period of active-duty service with a nonwaivable disqualification
7. Army Regulation 635-8 (Separation Processing and Documents), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clearcut record of all current active, prior active, and prior inactive duty service at the time of REFRAD, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.

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 (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 based on 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//