

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20240000892

APPLICANT REQUESTS:

a. Correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 29 June 2009 by:

- In effect, item 4a (Grade, Rate or Rank) from "PV1" to "SPC"
- In effect, item 4b (Pay Grade) from "E01" to "E04"
- Item 7b (Home of Record at Entry) Change from "83687-0000" to "83687"
- Item 11 (Primary Specialty) Change from "2 years 6 months" to "2 years 7 months"
- Item 18 (Remarks) Delete "Member has not completed first full term of service"
- Item 19a (Mailing Address after Separation) Change from "83687-0000" to "83687"
- Item 25 (Separation Authority) Change from "AR 635-200, para 14-12c" to "AR 635-200 Paragraph 5-1"
- Item 26 (Separation Code) Change from "JKQ" to "MBK"
- Item 27 (Reentry Code) Change from "3" to "1"
- Item 28 (Narrative Reason for Separation) Change from "Misconduct, (Serious Offense)" to "Discharge"
- Item 29 (Dates of time Lost During this Period) Change from "Under 10 USC 972: 20080813-18052009" to "nothing follows"

b. Personal appearance before the Board either in person or via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- Army Board for Correction of Military Records (ABCMR) Letter to Applicant Correction Completed AR20220007878
- Voided DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Reissued DD Form 214 (Certificate of Release or Discharge from Active Duty)
- ABCMR Letter to Applicant Full Relief Granted AR20220007878

- Record of Proceedings AR20220007878
- Enlisted Record Brief

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 his separation was found to be unjust and his discharge was upgraded to honorable. The corrections requested are needed for reenlistment. There are a few errors in zip codes, his time in service is off by one month, his rank prior to separation, and his separation code should reflect his upgraded discharge.
3. A review of the applicant's service records show:
  - a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army on 20 September 2008.
  - b. DA Forms 4187 (Personnel Action) show his duty status was changed on:
    - 13 August 2008, from present for duty (PDY) to absent without leave (AWOL)
    - 13 September 2008, from AWOL to dropped from rolls (DFR)
    - 18 May 2009, from DFR to PDY
  - c. DA Form 4856 (Developmental Counseling Form), 26 May 2009 shows he was counseled in regards to his possible separation for commission of a serious offense, being AWOL for 10 months. He agreed with the counseling and signed the form.
  - d. DA Form 3822 (Report of Mental Status Evaluation), 26 May 2009, shows he reported briefly seeking mental health treatment in August 2008 to try to get out of the Army. There was no evidence of psychotic process. His combat exposure was not a contributory factor. He was psychologically cleared for administrative separation.
  - e. On 28 May 2009 the applicant's commander initiated action to separate the applicant, in the rank of specialist/E-4 (SPC) under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c (Commission of a Serious Offense) for being AWOL from 13 August 2008 through 18 May 2009. The commander was recommending an under other than honorable conditions discharge, but the separation authority was not bound by that recommendation.

g. On 18 May 2009, the applicant stated he had been afforded the opportunity to consult with counsel. He had been advised, by his counsel, of the basis of the contemplated action to separate him for commission of a serious offense, its effects, the rights available to him, and the effect of any action taken by waiving his rights. The applicant conditionally waived his right to have his case heard by an administrative separation board on the condition he receive a characterization of service no less favorable than under honorable conditions (General). He declined to submit statements on his own behalf.

h. The applicant's chain of command recommended approval of the discharge with an under other than honorable conditions discharge.

i. On 28 May 2009, the separation packet of the applicant was found to be legally sufficient and provided the options for the separation authority regarding the separation.

j. DD Form 2808 (Report of Medical Examination), 29 May 2009, shows he was qualified for separation.

k. On 2 June 2009, the appropriate approval authority accepted the applicant's conditional waiver of the administrative separation board and directed he be issued an under honorable conditions (general) discharge.

l. DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice) shows the applicant, in the rank of SPC, accepted nonjudicial punishment for being AWOL from on or about 13 August 2008 to on or about 18 May 2009.

i. On 29 June 2009, the applicant in the rank of PVT was discharged under the provisions of Army Regulation 635-200, Chapter 14c for commission of a serious offense. His service was characterized as under other than honorable conditions. His DD Form 214 shows in:

- 4a (Grade, Rate or Rank) "PV1"
- 4b (Pay Grade) "E01"
- 7b (Home of Record at Entry) "83687-0000"
- 11 (Primary Specialty) "2 years 6 months"
- 18 (Remarks) "Member has not completed first full term of service"
- 19a (Mailing Address after Separation) "83687-0000"
- 25 (Separation Authority) "AR 635-200, para 14-12c"
- 26 (Separation Code) "JKQ"
- 27 (Reentry Code) "3"
- 28 (Narrative Reason for Separation) "Misconduct, (Serious Offense)"
- 29 (Dates of time Lost During this Period) "Under 10 USC 972: 20080813-20090518"

4. The applicant petitioned the ABCMR for a discharge upgrade.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct (serious offense) with the commander citing the applicant being absent without leave from 13 August 1008 to 18 May 2009. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board majority determined the narrative reason for separation should be amended to reflect misconduct and that the "serious offense" portion annotated on the DD Form 214 should be removed. The Board minority determined there was no error and the narrative reason for separation should not be amended.

2. The Board concluded that the applicant's request for amendment of his rank from private to specialist (SPC)/E-4 was without basis as he was discharged and reduced to the lowest enlisted grade and there was no error in that process and therefore denied relief of that portion of his request. Additionally, as it relates to his request to amend the primary specialty years and months, home of record at entry, to delete the remark "Member has not completed first full term of service," to amend his mailing address after separation, to amend the separation authority, to amend the separation code, to amend the reentry code, and to remove the dates of lost time, the Board concluded there was no error or injustice in these entries and denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	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 partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 29 June 2009, to show in item 28 (Narrative Reason for Separation): Misconduct.

2. The Board further determined that 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 any relief in excess of the above.

█

█ █

█  
█

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 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 Soldier for a variety of reasons.

a. Chapter 5 (Separation for Convenience of the Government) separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

b. Chapter 14 of the regulation dealt with separation for various types of misconduct. The issuance of a discharge under other than honorable conditions (UOTHC) was normally considered appropriate for separations under the provisions of chapter 14. In a case in which an UOTHC is authorized by regulation, a member may be awarded an honorable or general discharge, if during the current enlistment period of obligated service, he has been awarded a personal decoration or if warranted by the particular circumstances of a specific case. Paragraph 14-12c provided for the separation of a Soldier due to commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same or a closely related offense under the Manual for Court-Martial.

3. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code

- JKQ is used for discharge for misconduct
- MBK is used for completion of required Active Service

4. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reenry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

6. On 25 August 2017 the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

7. 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.

a. 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.

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.

8. Army Regulation 635-5 (Personnel Separation Documents) prescribes the separation documents that must be prepared for Soldiers on retirement, discharge, release from active duty service, or control of the Active Army. It states when completing the DD Form 215 in block:

a. 4a (Grade, Rate or Rank) Enter active duty grade or rank and pay grade at time of separation.

b. 7b (Home of Record at Entry) Enter the street, city, state and zip code listed as a Soldier's home of record.

c. 11 (Primary Specialty) From the Enlisted Record Brief enter the titles of all military occupational specialties (MOS) served for at least 1 year and include for each MOS the number of years and months served. For time determination, 16 days or more count as a month. Do not count basic training or advanced individual training.

d. 18 (Remarks) Mandatory entry: "Soldier (has) (has not) completed first full term of service." This information assists the state in determining eligibility for unemployment compensation entitlement.

e. 19a (Mailing Address after Separation) This address must be a permanent address.

f. 25 (Separation Authority) Obtain correct entry from regulatory or directives authorizing the separation.



g. 26 (Separation Code) Obtain correct entry from AR 635-5-1, which provides the corresponding separation program designator code for the regulatory authority and reason for separation.

h. 27 (Reentry Code) Army Regulation 601-210 determines Regular Army reentry eligibility and provides regulatory guidance on the reentry code.

i. 28 (Narrative Reason for Separation) This is based on regulatory or other authority and can be checked against the cross reference in Army Regulation 635-5-1.

j. 29 (Dates of time Lost During this Period) Verify that time lost as indicated by Defense Finance and Accounting Service agencies has been subtracted from Net Active Service This Period (block 12c) if the lost time was not "made good". If the expiration term of service was adjusted as a result of lost time and the Soldier served until their expiration term of service, the lost time was "made good". Lost time under Title 10 USC 972 is not creditable service for pay, retirement, or veteran's benefits.

9. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial. It provides that a commander should use nonpunitive administrative measures to the fullest extent to further the efficiency of the command before resorting to NJP under the UCMJ. Use of NJP is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. NJP may be imposed to correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures; to preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction; and to further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

a. Paragraph 3-6a addresses filing of NJP and provides that a commander's decision whether to file a record of NJP in the performance folder of a Soldier's OMPF is as important as the decision relating to the imposition of the NJP itself. In making a filing determination, the imposing commander must carefully weigh the interests of the Soldier's career against those of the Army to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the Soldier's age, grade, total service (with particular attention to the Soldier's recent performance and past misconduct), and whether the Soldier has more than one record of NJP directed for filing in the restricted folder. However, the interests of the Army are compelling when the record of NJP reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the record should be filed in the performance folder.

b. Paragraph 3-28 (Setting Aside and Restoration) states:

(1) This is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. NJP is "wholly set aside" when the commander who imposed the punishment, a successor-in-command, or a superior authority sets aside all punishment imposed upon an individual under Article 15. The basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means there exists an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier. An example of clear injustice would be the discovery of new evidence unquestionably exculpating the Soldier. Clear injustice does not include the fact that the Soldier's performance of service has been exemplary subsequent to the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the Soldier.

(2) Normally, the Soldier's uncorroborated sworn statement will not constitute a basis to support setting aside punishment.

(3) In cases where administrative error results in incorrect entries on the DA Form 2627 or DA Form 2627-1 (Summarized Record of Proceedings under Article 15, UCMJ), the appropriate remedy generally is an administrative correction of the form and not setting aside of punishment.

(4) The power to set aside an executed punishment and to mitigate a reduction in grade to a forfeiture of pay, absent unusual circumstances, will be exercised only within 4 months after the punishment has been executed. When a commander sets aside any portion of the punishment, the commander will record the basis for this action according to DA Form 2627, notes 11 and 12; DA Form 2627-1, notes 9 and 10; or DA Form 2627-2 (see paragraph 3-38b). When a commander sets aside any portion of the punishment after 4 months from the date punishment has been executed, a detailed addendum of the unusual circumstances found to exist will be attached to the form containing the set aside action.

c. Paragraph 3-37b(2) states that for Soldiers in the ranks of SGT and above, the original DA Form 2627 will be sent to the appropriate custodian for filing in the OPMF. The decision to file the original DA Form 2627 in the performance folder or restricted folder of the OPMF will be made by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is subject to review by superior authority. However, the superior authority cannot direct filing a DA Form 2627 in the performance folder that the imposing commander directed to be filed in the restricted folder.

d. Paragraph 3-43 contains guidance for transfer or removal of DA Forms 2627 from the OMPF. Applications for removal of a DA Form 2627 from the OMPF based on an error or injustice will be made to the ABCMR. There must be clear and compelling evidence to support removal of a properly completed, facially valid DA Form 2627 from a Soldier's record by the ABCMR.

10. 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 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//