

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 October 2024

DOCKET NUMBER: AR20240003539

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions characterization of service
- 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)

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 he was a young Soldier at the time and made a mistake that he has been paying for almost 30 years. He continues to think about his issues and the way it negatively affected his military service. As he matures, he thinks about different opportunities he let pass due to his behavior. As he has been incarcerated, he has been a leader to many young men and been there to help them navigate this negative environment to help them be successful. Throughout his three decades in prison, he has seen many young men change their life with his guidance to a better future by upholding his corps Army values.
3. A review of the applicant's service record shows:
 - a. The applicant enlisted in the Regular Army on 10 September 1992. The highest grade he held was specialist (SPC)/E-4.
 - b. Laboratory Confirmed Biochemical Test Results, dated 12 May 1993, show the applicant tested positive for marijuana.

c. On 9 June 1993, an investigator from the Criminal Investigation Division (CID) advised the applicant of his rights and questioned him about wrongful possession and use of a controlled substance (marijuana), which the applicant waived and rendered a sworn statement admitting to using marijuana. On 10 June 1993, the investigator coordinated with the Staff Judge Advocate, who opined that there was sufficient probable cause to title the applicant with wrongful possession and use of a controlled substance. This was the final report and no further investigative efforts were required, and the investigation was closed.

d. On 27 February 1995, the applicant's duty status changed from present for duty (PDY) to confined in the hands of civil authorities (CCA).

e. On 15 August 1995, the applicant pled guilty to the following charges:

- Count I – Murder in the first degree: unlawfully and feloniously with premeditated intent to cause the death of another, repeatedly stabbed [REDACTED] to death.
- Count II – Murder in the second degree: unlawfully and feloniously with intent to cause the death of another, caused the death of [REDACTED]

f. The applicant was found guilty by plea to the Counts and Charges of murder in the first degree and murder in the second degree. On 24 October 1995, he was sentenced to confinement for 50 years.

g. On 21 March 1996, the applicant's immediate commander notified the applicant of his intent to initiate separation actions against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, paragraph 14-5a, by reason of misconduct – conviction by civil court. The commander listed the following reason for the proposed action: the applicant pled guilty on 15 August 1995 to charges of first-degree murder and second-degree murder in civil court. The commander informed the applicant he was recommending he receive a discharge under other than honorable conditions and explained his rights.

h. On 29 March 1996, the applicant authorized his Defense Counsel to fill out the rights advisement form on his behalf since he could not be present. The Defense Counsel filled out the form as the applicant instructed her to do so. He acknowledged receipt of the separation notification, declined consideration of his case by an administrative separation Board (if his service was characterized no less favorable than general), elected not to submit statements in his own behalf, and acknowledged that he had been advised of the basis for his contemplated separation and its effects, the rights available to him, he personally made the choices indicated.

i. On 12 April 1996, the applicant's immediate commander recommended approval of the separation under the provisions of AR 635-200, chapter 14, paragraph 14-5a, for conviction by civil court, with an under other than honorable conditions characterization of service. The immediate commander noted that the applicant conditionally waived the right to appear before an administrative separation board contingent upon receiving a discharge no less favorable than general, under honorable conditions. The intermediate commanders echoed the immediate commander's recommendation.

j. On 6 May 1996, the applicant was notified by the Board Recorder that a board of officers was being convened to determine whether he should be separated from the U. S. Army for conviction by civil court, under AR 635-200, chapter 14, paragraph 14-5, and explained his rights.

k. On 8 May 1996, the applicant authorized his Defense Counsel to fill out the rights advisement form on his behalf since he could not be present. The Defense Counsel filled out the form as the applicant instructed her to do so. The applicant acknowledged receipt of the notification of the board. He acknowledged that he had been afforded the opportunity to consult with counsel, he declined consideration of his case by an administrative separation board (if his service was characterized no less favorable than other than honorable), he waived a personal appearance before an administrative separation board (if his service was characterized no less favorable than other than honorable), and he elected not to submit statements in his own behalf.

l. On 16 May 1996, the separation authority approved the discharge and directed the applicant be issued an under other than honorable conditions discharge and that he be reduced to the lowest enlisted grade.

m. The applicant was discharged on 11 June 1996. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, chapter 14, section II, misconduct, in the rank/grade of private/E-1, and his service was characterized as under other than honorable conditions. He completed 2 years, 5 months, and 11 days of net active service during the covered period. Additionally, his DD Form 214 shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): National Defense Service Medal, Army Service Ribbon, and the Expert Marksmanship Qualification Badge with rifle bar.
- Item 26 (Separation Code): JKB
- Item 27 (Reentry Code): 3
- Item 29 (Dates of Time Lost During This Period): Under 10 USC 972: 27 February 1995 – 11 June 1996

4. There is no indication the applicant applied to the Army Discharge Review Board for review of his discharge processing within that Board's 15-year statute of limitations.
5. Regulatory guidance states when an individual is discharged under the provisions of Chapter 14, AR 635-200 for misconduct, an under other than honorable conditions characterization of service is normally appropriate.
6. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. The Board determined 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.
2. 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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The evidence of record shows the applicant was convicted by a civil court of the charges of murder in the first degree and murder in the second degree. He was sentenced to confinement for 50 years. As a result, his chain of command initiated separation action against him due to his civil conviction. He was discharged with an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature, and that outweigh his misconduct, in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation 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.

10/31/2024

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, 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 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is used for a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct or for the good of the service.

d. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

3. AR 635-5-1 (Separation Program Designator (SPD) Codes), in effect at the time, provided that enlisted Soldiers separated under the provisions of AR 635-200, chapter 14 for misconduct would receive a separation code of "JKB."

4. AR 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.

5. 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.

6. 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//