

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 November 2024

DOCKET NUMBER: AR20240004352

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to under honorable conditions (General)
- a personal appearance before the Board

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

DD Form 293 (Application for the Review of Discharge)

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 is requesting an upgrade of his discharge so he can receive medical benefits from the Department of Veterans Affairs (VA). He has service treatment records that show conditions he received from his military service, which allow him to be treated at the VA. He was in Iraq in 2007 for 7 months. He was medically evacuated back to the states for red blood cells in his urine. He was in the wounded warrior program for 90 days where it was found he had a herniated disc. Due to having a herniated disc, while in the Army, he was unable to keep gainful employment. He was an 88M (Truck Driver) in the military, which caused him to have constant ringing in his ears. He was also diagnosed with sleep apnea and issued a CPAP machine. The VA has recognized his conditions from his military time and is treating him for his back, ringing in his ears, and sleep apnea. Therefore, he is requesting the Department of Defense grant his discharge upgrade.
3. A review of the applicant's service records show:
  - a. He enlisted in the Regular Army on 30 September 2005.

b. A Trial Order, shows a hearing date of 31 March 2008 and the charges of Carnal Knowledge of a Minor on three occasions and Indecent Liberties on one occasion to which the applicant pled guilty to and was found guilty. His sentencing hearing was set for 20 June 2008.

c. DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), shows a flag was initiated on 18 July 2008 for elimination actions.

d. Memorandum for Record, 18 July 2008, shows the applicant was incarcerated in civilian confinement in Norfolk, Virginia. The commander was initiating administrative separation on him; however, due to his status, the unit was unable to acquire the required medical examinations.

e. On 4 August 2008, the applicant's commander initiated separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-5 Civil Court Conviction because he was found guilty of carnal knowledge of a minor and indecent liberties with a minor. His commander was recommending he receive an under other than honorable conditions discharge. The separation authority and intermediate authorities were not bound by the recommendation. On the same day, the applicant acknowledged receipt of the initiation of elimination.

f. On 4 September 2008, after consulting with counsel, the applicant acknowledged counsel had advised him of the basis for the separation action, the rights available to him, and the effect of waiving those rights. He requested counsel and unconditionally waived his right to an administrative separation board. He submitted a statement in his own behalf, which states, in effect:

(1) He thanked the approval authority for taking the time to read the statement and he was sorry to take the approval authority's time to rule on a case like his. He wished he could sit down and talk to the approval authority face-to-face because words could not describe what he had been through over the year. Now everything he worked so hard for is possibly gone.

(2) He hurts for his family, friends, chain of command, and fellow Soldiers because of the stress and shame the situation may have caused. When the media tries to bury you for ratings, they put twists and spins on the story, plus they add whatever they want to the story and there is nothing you can do. His downfall is he allowed himself to walk into this situation without properly checking it out all the way. He has never been in any trouble before and now he has been incarcerated all year.

(3) He took the guilty plea because he could not afford a decent lawyer and he also did not have the money to fight. Since the commonwealth had a lack of real

evidence, they would have continued his case over and over again. He is sitting in jail right now with people that have been there for over two years and still have not gone to trial.

(4) The evidence they claim to have was just a scare tactic. It was never in his discovery or used in court. So his ineffective counsel talked him into a guilty plea and then took what little money his family had and then some.

(5) There was a lot of foul play in his case. He asked the approval authority to educate Soldiers because the same thing could happen to them. He is broke because he has not worked all year. Financially that has put a toll on him and his family and they need him. Physically, he still needs surgery and if he stays on the medication that does not work, the side effects will damage him for life. Mentally the constant worrying and emotional stress has affected his parents physically as well. They have been going to see different doctors throughout the year because of the stress.

g. A self-authored letter to the judge on his case, which states, in effect:

(1) He feels the judge is the only one left who can help him. He took the guilty plea that stems from 1 year and 11 months in prison to a high of 5 years and 2 months to 8 years and 2 months. He received 4 years for the offense. Even though he felt it might have been a little high for this situation, if his lawyer would have done his job, he would have accepted that without reaching out to the judge. He truly feels the sentence would not have been so high.

(2) He understands that lawyers cannot help every client the way they want to, but as the client you should leave the situation feeling like the lawyer did all they could for you. His lawyer was unprofessional, lacks integrity, and has no sense of self-pride when it came to the applicant's case. Also he has disregarded special instruction, he has breached their confidentiality twice, he has also played on the applicant and his families' ignorance since they do not know the law and no one in his family had ever been in trouble.

(3) He does know good character and the lawyer has not shown it. The thing in which the lawyer told the applicant he would do to be effective in court during sentencing he did not do any of them. He did not cross-examine, he did not call any of the applicant's character witnesses, and his body language displayed that of which he has something better to do. The lawyer's performance was unreasonably below standards.

(4) The applicant put his life on the line in Iraq, the previous year not for his lawyer to take what little bit of money his family had and run without doing his job. On 26 August the applicant called his lawyer and told him he wanted to file a notice of

appeal and the lawyer told him no and the applicant filed his own notice of appeal since his lawyer was not doing his job.

(5) He told his lawyer several times he wanted a bail hearing and he never received one, because he feels his lawyer just did not want to do it. The lawyer knew he needed to have surgery since he was medical evacuated from Iraq, plus he was going through legal issues with the military because he is in this situation and right now he does not know how he would get surgery and he could not represent himself in front of the military board. His lawyer knew all that he lost and all that he and his family is going through. The applicant thought his lawyer would have at least cared somewhat, while he was taking their money.

(6) The applicant did not mention how ineffective his lawyer has been in his letter of reconsideration because he was scared his lawyer would sabotage him. Also he wanted the judge to understand how much this situation has affected his life as well. He has been in jail for a long time now. He realizes one lifetime is all you have and your next breath is not promised so you have to fight for what little time you have on this earth and live life to the fullest. He does want to return to the military, finish college, make everyone that knows him including himself proud, get physically healthy, and live a normal life.

h. The applicant's chain of command recommended approval of his separation for civil conviction with an under other than honorable conditions characterization of service. In an undated memorandum, the appropriate approval authority ordered the applicant's separation with an under other than honorable conditions discharge.

i. On 10 October 2008, he was discharged accordingly. He completed 2 years, 3 months, and 8 days of active duty service. He was discharged for misconduct (civil conviction), his characterization of service was under other than honorable conditions, his separation code was JKB, and his reentry code was 3. He had lost time from 8 January 2008 to 10 October 2008. He was awarded or authorized the National Defense Service Medal, Global War on Terrorism Service Medal, and the Army Service Ribbon.

j. There is no evidence in his record to show he had any medical conditions. The applicant did not provide medical documentation.

k. There is no evidence in his service record to show he had service in Iraq.

4. There is no evidence the applicant applied to the Army Discharge Review Board within that board's 15-year statute of limitations.

5. In reaching its determination, the Board can consider the applicants 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 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 with the commander citing a civil conviction for carnal knowledge of a minor and indecent liberties with a minor. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. 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

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|---|---|---|----------------------|
| : | : | : | 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, 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 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.

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

a. 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. 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. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

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.

4. 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 JKB is used for discharge for misconduct, civil conviction.

5. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry 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.

6. 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.

//NOTHING FOLLOWS//