

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE:

DOCKET NUMBER: AR20240005699

APPLICANT REQUESTS: upgrade of his under other than honorable conditions discharge to honorable. Also, his bonus reinstated.

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 request that his discharge be upgraded to honorable. His DD Form 214 (Certificate of Release or Discharge from Active Duty) should be changed to reflect an honorable discharge. He wants his bonus reinstated, and his veterans status be changed so he can receive his full benefits for his time in service. He was left in detachment for months. His issued equipment was stolen even though it was secured by Non-Commissioned Officers (NCO) in detachment. He had little to no available leadership or mentoring throughout his time with 3d Psychological Operations Battalion (POB). He was routinely pressured and manipulated into actions unbecoming of a soldier by members of the Psyop community. His time with the unit was more or less an operation. Psyop that he was not equipped to handle. Disagreements with NCO's in his company ultimately lead to his discharge of, other than honorable. He hopes the Board will reconsider his discharge as it has caused a great deal of turmoil for him. It effects his ability to receive benefits and funding for education. It has negatively affected his personal morale and has been a stain on his reputation. He does not fully understand why he was chosen for assignment to 3d POB. He wholeheartedly disagrees with the decision. He thinks with a bit of honesty and mentoring that he could have been an asset to the company instead of a mark for nefarious activity. He is trying to move on with his life and career and would like to close this chapter of his life on a positive note.

3. The applicant enlisted in the Regular Army on 25 August 2000. He also enlisted for an incentive of airborne bonus (\$3,000.00). He acknowledged and understood that his incentive was subject to the following conditions:

- Should he fail to satisfactorily complete the Advanced Individual Training or One Station Unit Training, he will be trained in another military occupational specialty (MOS) or Career Management Field and required to complete his term of enlistment based upon the needs of the Army, forfeiting any entitlement of the Cash Bonus, LAP, or Army College Fund
- He will lose entitlement to the incentive above if he fails to successfully complete training (including academic failure) and receive the MOS he had enlisted for
- He must stay qualified in his incentive MOS for the duration of his initial enlistment, unless otherwise directed by Headquarters, Department of the Army

4. He held MOS 31U (Signal Support Systems Specialist).

5. On 30 September 2002, his command was notified of a positive drug test for Tetrahydrocannabinol (THC) related to the applicant.

6. On 3 December 2002, he received non-judicial punishment under article 15 of the Uniform Code of Military Justice (UCMJ) for on or about 20 November 2002, as a result of wrongful previous overindulgence in intoxicating liquor incapacitated for the proper performance of his duties. Also, on or about 20 November 2002, with intent to deceive, make to an NCO, an official statement that he had an appointment at Womack Hospital at 0930 hours, which statement was totally false, and was then known by him to be so false. He was reduced to private/E-1.

7. DD Form 458 (Charge Sheet) shows court martial charges were preferred on 16 December 2002, for the charges of:

a. AWOL, and its four specifications of:

- On or about 25 November 2002, without authority, fail to go at the time prescribed to his appointed place of duty (0730 hours clean sweep formation)
- On or about 28 October 2002, without authority, fail to go at the time prescribed to his appointed place of duty (0630 accountability formation)
- On or about 21 October 2002, without authority, fail to go at the time prescribed to his appointed place of duty (0630 accountability formation)
- On or about 29 August 2001, without authority, fail to go at the time prescribed to his appointed place of duty (0620 accountability formation)

b. Insubordinate conduct, and two specifications of:

- On or about 2 October 2002, was disrespectful in deportment toward an NCO, by not standing at parade rest
- On or about 2 October 2002, was disrespectful in language toward an NCO, by saying "I don't give a shit," or words to that effect

c. Failure to obey an order and its specification of on or about 2 October 2002, was derelict in the performance of those duties in that he willfully failed to adhere to the barracks standard operating procedure.

d. Wrongful use, possession, etc., of controlled substances and its specification of between on or about 17 August 2002 and 17 September 2002, wrongfully use marijuana.

8. On 17 December 2002, the suspended portion of his punishment (forfeiture of \$300.00) imposed on 3 December 2002, was vacated for on or between 18 August and 17 September 2002, wrongfully use marijuana, a controlled substance.

9. On 23 December 2002, the applicant voluntarily requested discharge in lieu of trial by court-martial under Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10. He understood that he may request discharge in lieu of trial by courts-martial because of the charges preferred against him on DD Form 458 on 16 December 2002, under the UCMJ, authorized the imposition of a bad conduct or dishonorable discharge. He had the opportunity to consult with counsel who has fully advised him of the nature of his rights under the UCMJ, the elements of the offense with which he was charged, any relevant lesser included offense(s) thereto, and the facts that must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if he was found guilty.

a. He understood that, if his request for discharge is accepted, he may be discharged under conditions which are other than honorable and furnished an Under Other than Honorable Discharge Certificate.

b. He had been advised and understood the possible effects of an under other than honorable conditions discharge and that as a result of the issuance of such discharge, he will be deprived of many or all Army benefits, that he may be ineligible for many or all benefits administered by the Veteran's Administration, and that he may be deprived of his rights and benefits as a veteran under both Federal and State law.

c. He also understood that he may expect to encounter substantial prejudice in civilian life because of an under other than honorable conditions discharge.

10. On 27 December 2002, his chain of command recommended approval with an other than honorable discharge.

11. On 27 January 2003, the separation authority approved his request and directed an under other than honorable conditions discharge.

12. Accordingly, he was discharged under other than honorable conditions on 7 February 2003, under the provisions of AR 635-200, chapter 10. His DD Form 214 shows he completed 2 years, 5 months and 13 days net active service this period. His DD Form 214 also shows:

- Item 26 (Separation Code): KFS
- Item 27 (Reentry Code): 4
- Item 28 (Narrative Reason for Separation): In Lieu of Trial by Court-Martial

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

14. By regulation, (AR 635-200) sets forth the basic authority for the separation of enlisted personnel. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

15. AR 601-210 (Active and Reserve Components Enlistment Program) governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army and the U.S. Army Reserve for enlistment on or after the effective date of this regulation.

16. 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 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 charged with offenses punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was not in error or unjust.

2. As it relates to the applicant’s request that his bonus be reinstated, the Board concluded the applicant did not meet the terms of the agreement in that he did not remain qualified in his incentive MOS for the duration of his initial enlistment, due to him being administratively separated prior to the expiration of his term of service; thus he was ineligible for the bonus incentive. The Board denied 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:

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 (AR) 635-200 (Active Duty Enlisted Administrative Separations) provides the basic authority for the separation of enlisted personnel. Chapter 3, Section II provides the authorized types of characterization of service or description of separation.

a. Paragraph 3-7a states an honorable discharge is a separation with honor and 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. Paragraph 3-7b states a general discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c states under other-than-honorable-conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

d. Chapter 10 provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may submit a request for a discharge for the good of the Service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Army policy states that although an honorable or general, under honorable conditions discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

3. AR 601-210 (Active and Reserve Components Enlistment Program) states under termination of incentives, incentive eligibility will be stopped when any of the termination reasons as listed apply and that member shall not be eligible to receive any further incentive payments, except for Service performed before the termination date. Once declared ineligible, termination of an incentive will not affect a Soldier's responsibility to serve their current statutory or contractual Service commitment. Recoupment of

Incentives. When relief is not granted through the waiver process from incentives received, the member must refund a pro-rata amount to the Government when termination is due.

4. DoD 7000.14-R Financial Management Regulation Volume 7A, Chapter 2 (Repayment of Unearned Portion of Bonus and Other Benefits) establishes policy pertaining to the repayment of unearned portions of bonuses and other benefits. A member, who enters into a written agreement with specified service conditions for receipt of a bonus, special or incentive pay, educational benefits, stipend, or similar payment is entitled to the full amount of the pay or benefit if the member fulfills the required conditions. Failure to fulfill the conditions specified in the written agreement may result in termination of the agreement and the member may be required to repay the unearned portion of the pay or benefit. Such repayment will be pursued unless the member's failure to fulfill the specified conditions is due to circumstances determined reasonably beyond the member's control. Conditions under which repayment will not be sought are set forth in section 0203.

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 (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//