

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 July 2023

DOCKET NUMBER: AR20220008159

APPLICANT REQUESTS: an upgrade of the characterization of service for her deceased brother, a former service member (FSM), from under other than honorable conditions to honorable.

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

- DD Form 149 (Application for Correction of Military Record), 8 September 2022
- self-authored statement, 15 September 2020
- 2 Certificate of Birth, 20 January 1960 and 27 February 1962
- Divorce Court Order, 6 January 1968
- Certificate of Commissioned Kentucky Colonel, 21 May 1986
- Certificate of Death, 4 November 1997
- Evidence/ Recovered Property form, 4 November 1997
- Form AOC-296 (Name Change Order), 24 July 2003
- Privacy Act Release Form, 22 July 2021
- email, (Subject: From the Office of Congressman Brett Guthrie), 9 September 2022

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, in effect:
 - a. Her brother served his country for 2 years and 4 months. He had 6 months left before he would have been discharged from the military.
 - b. The FSM would not have provoked a situation unless there was more going on. They were raised in a Baptist children's home where they were taught to always respect anyone in uniform and to always obey those in command.

c. She picked up her brother at the airport in Louisville, KY after he went absent without leave. She had no idea what had happened but knew he had been beaten bad. His eye was swollen shut and full of blood. She asked him what had happened, and he told her "Not to worry about it." Eventually he had told her the truth and she advised him that he needed to turn himself in. She took him to Fort Knox, KY on 20 October 1981, and he went to Fort Lewis from there.

d. Her brother was far from perfect, but one fight should not stay with him forever. He did great things after leaving the military. He was a welder, electrician, music player, and helped others in their community. She believes her brother deserves a second chance and he deserves his military flag. Their other relatives who have served in the military have received that honor and all have honorable discharges.

e. Her brother served with honor. He had one bad incident, and he took responsibility for his actions. If it were not for his misconduct, he would have received an honorable discharge. She cannot get her brother's American flag to go with their other family members flags without upgrading his discharge records.

3. The FSM enlisted in the regular Army on 16 July 1979, for a period of 3 years.

4. On 18 April 1980, the FSM accepted non-judicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for misconduct:

- On or about 9 April 1980, assault Specialist (SPC) L.O., by striking at him with his fist.
- On or about 9 April 1980, having received a lawful order from Sergeant (SGT) E. R., his superior non-commissioned officer (NCO), to go to bed, willfully disobey the same.
- On or about 10 April 1980, without authority, fail to go at the time prescribed to his appointed place of duty.
- On or about 10 April 1980, having received a lawful order from Sgt T.B., his superior NCO, to report to First Lieutenant (1LT), S.M., willfully disobey the same.
- On or about 10 April 1980, behave with disrespect toward 1LT S.M., his superior commissioned officer, by contemptuously saying to him, "Tell 1LT Mxxx that if he wants to see me that he can report to me," or words of that effect.

His punishment consisted of forfeiture of \$116 pay and 14 days extra duty/restriction.

5. The FSM's record contains three DA Forms 4187 (Personnel Action), which show the below changes to his duty status:

- Present for Duty (PDY) to Absent Without Leave (AWOL) – 2 July 1981

- AWOL to Dropped from Rolls (DFR) – 1 August 1981
- DFR to Confined by Military Authorities (surrendered) – 6 October 1981

6. A DD Form 458 (Charge Sheet) shows on 27 October 1981, the following court martial charges/specifications were preferred against the FSM:

- Charge I: Article 91 (Insubordinate Conduct)
 - Specification 1: on or about 2 July 1981, having received a lawful order from Staff Sergeant (SSG) L.H., his superior NCO, to get out of bed, did willfully disobey the same.
 - Specification 2: on or about 2 July 1981, assault SSG L.H., by pushing SSG L.H. with his hands.
 - Specification 3: on or about 2 July 1981, assault SSG L.H., his superior NCO, by swinging at the head of SSG L.H. with a wooden stick.
 - Specification 4: on or about 2 July 1981, was disrespectful in language toward SSG L.H., his superior NCO, by saying to him, "Come on, pussy," or words to that effect.
- Charge II: Article 134 (General Article). Specification: on or about 2 July 1981, wrongfully communicate to SSG L.H., a threat, to wit: "I'll kick your ass," and "I'm going to kill you," or words to that effect.
- Charge III: Article 86 (AWOL). Specification: on or about 2 July 1981, without authority, absent himself from his unit (AWOL) and did remain so absent until on or about 6 October 1981

7. On 11 January 1982, after consulting with legal counsel, the FSM voluntarily requested discharge for the good of the service, under Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), chapter 10. The FSM acknowledged that he made the request of his own free will and was not coerced by any person. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charges against him or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veteran's Administration, he could be deprived of his rights and benefits as a veteran under both Federal and State law and encounter substantial prejudice in civilian life because of an under other than honorable discharge. He elected not to submit a statement on his own behalf.

8. On 18 January 1982, the separation authority approved the requested discharge under the provisions of AR 635-200, chapter 10, for the good of the service, with an under other than honorable conditions characterization of service.

9. On 19 January 1982, the applicant underwent a mental status evaluation. The doctor did not note any mental health issues and found the applicant had the mental capacity to understand and participate in separation proceedings.

10. The FSM's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 27 January 1982, under the provisions of AR 635-200, chapter 10, by reason of administrative discharge – conduct triable by court-martial, in the rank/grade of PV1/E-1. His service was characterized as under other than honorable conditions, and he received a separation code of JFS and a reentry code of 4. He completed 2 years, 3 months, and 6 days of net active service with lost time from 2 July 1981 to 5 October 1981. Additionally, his DD Form 214 does not list any decorations or awards.

11. The applicant provides:

- 2 certificates of live birth, which show she is the sister of the FSM.
- A divorce court order showing her parents divorced on 6 January 1968
- A certificate from the Governor of the Commonwealth of Kentucky, showing the applicant was commissioned a Kentucky Colonel on 21 May 1986
- A certificate of death, showing the FSM was pronounced dead 4 November 1997
- Evidence/Recovered Property form dated 4 November 1997 showing the applicant was the recipient of her brother's property after his death
- A Form AOC-296, Commonwealth of Kentucky, shows the applicant changed her last name on 24 July 2003
- An email from the office of Congressman B.G., Second District Kentucky, dated 9 September 2022, showing the applicant contacted his office requesting assistance from the ABCMR with correcting her brother's military records

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

13. The pertinent Army regulation in effect at the time provided discharges under the provision of Army Regulation 635-200, chapter 10, where voluntary requests from the Soldier to be discharged in lieu of a trial by court-martial.

14. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, 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 Board considered the applicant's statement and record of service, and the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions characterization of service. The applicant provided insufficient evidence of post-service achievements, letters of reference/support, or evidence of a persuasive nature 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.

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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 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 provided that a member who committed an offense or offenses, the punishment for which includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the member, regardless of whether the charges are referred to a court-martial and regardless of the type of court-martial to which the charges may be referred. The request for discharge may be submitted at any stage in the processing of the charges until final action on the case by the court-martial convening authority. Commanders will ensure that a member is not coerced into submitting a request for discharge for the good of the service. The member will be given a reasonable time to consult with consulting counsel and to consider the wisdom of submitting such a request for discharge. After receiving counseling, the member may elect to submit a request for discharge for the good of the service. The member will sign a written request, certifying that they were counseled, understood their rights, may receive a discharge under other than honorable conditions, and understood the adverse nature of such a discharge and the possible consequences. A discharge under other than honorable conditions was normally appropriate for a member who is discharged for the good of the service. However, the discharge authority may direct an honorable or general discharge if such are merited by the member's overall record during the current enlistment.

b. An honorable discharge is a separation with honor. Issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. A general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

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

3. 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.

//NOTHING FOLLOWS//