

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 3 August 2023

DOCKET NUMBER: AR20230000563

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general) for the period ending 23 January 1970. Additionally, he requests an appearance before the Board.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Report of Separation from Active Duty)

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 dishonorable discharge given after service during 1967 to 1970. He does not have a copy of the discharge for service ending in 1970. However, he reentered service in 1974 to 1975.
3. The applicant was inducted into the Army of the United States on 25 April 1967. His military occupational specialty was 11B (Light Weapons Infantryman).
4. He served in Vietnam from 2 May 1968 through 6 September 1968.
5. Before a special court-martial on 24 February 1968 at Fort Carson, Colorado, the applicant was found not guilty of without authority being absent without leave (AWOL) from his unit on or about 27 September 1967 until on or about 3 January 1968. The findings were approved on 7 March 1968.
6. Before a special court-martial on 19 March 1969 at Schofield Barracks, Hawaii, the applicant was found guilty of being AWOL from his unit from on or about 27 September 1968 until on or about 2 February 1969. The court sentenced him to confinement at

hard labor for six months, forfeiture of \$46.00 pay for six months, and reduction to private/E-1. The sentence was approved on 24 March 1969.

7. Special Court-Martial Order Number 13, dated 29 May 1969, issued by Headquarters, U.S. Army Hawaii, suspended the unexecuted portion of the approved sentence.

8. The applicant was reported as AWOL on 21 June 1969 and dropped from the unit rolls as a deserter on 23 July 1969.

9. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ) on 12 November 1969, for being AWOL from on or about 21 June 1969 until 6 November 1969.

10. A Statement of Medical Condition, dated 23 January 1970, shows there had been no change in his medical condition since his last separation examination.

11. The available record is void of the applicant's separation packet showing he consulted with legal counsel, and voluntarily requested discharge for the good of the service in lieu of trial by court-martial, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10.

12. The applicant was discharged on 23 January 1970. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, with Separation Program Number 246 [for the good of the service-in lieu of trial by court martial] with Reentry Eligibility (RE) code RE-3A, RE-3, RE-3B. His service was characterized as UOTHC. He completed 1 year, 9 months, and 15 days of net active service this period. He lost 194 days of service. He was awarded or authorized the: National Defense Service Medal, Vietnam Service Medal, and the Vietnam Campaign Medal.

13. Having had prior service in the U.S. Army Reserve, the applicant enlisted in the Regular Army on 1 May 1974 for three years.

14. He was reported AWOL on 3 June 1974 (while still in training) and dropped from the unit rolls as a deserter on 2 July 1974.

15. The applicant accepted nonjudicial punishment under Article 15 of the UCMJ, for being AWOL from on or about 3 June 1974 until on or about 18 July 1974. His punishment consisted of forfeiture of \$50.00 pay for 2 months and restriction.

16. The applicant was again reported AWOL on 27 September 1974 and dropped from the rolls as a deserter on 26 October 1974.

17. A Federal Bureau of Investigation (FBI) form, dated 25 March 1975, shows the applicant surrendered to the FBI on 25 March 1975 as a result of an investigation. He was returned to military control on 26 March 1975.

18. Before a summary court-martial on 31 March 1975 at Fort Leonard Wood, Missouri, the applicant was found guilty of being AWOL from on or about 27 September 1974 through on or about 25 March 1975. The court sentenced him to forfeiture of \$220.00 pay for one month and restriction for 60 days. The sentence was approved on 31 March 1975.

19. The applicant's commander notified him that he was being recommended for discharge from the service under the provisions of Army Regulation 635-200, Chapter 13, for unsuitability. The reason was based on the applicant's defective attitude and inability to expend effort in a constructive manner. He was advised of his rights.

20. On 31 March 1975, the applicant consulted with legal counsel and was advised of the basis for the contemplated action to separate him. He was further advised of the rights available to him and the effect of any action by him in waiving his rights. The applicant waived appearance before a board of officers, representation by counsel, and to submit a statement in his own behalf.

21. On 3 April 1975, he was evaluated by a social worker. The applicant's problems, and impressions show he went AWOL because he said the Army gets on his nerves because it has too many rules and regulations. He has no desire to remain on duty. No psychiatric history was noted and there were no signs of character or behavioral disorders during the initial interview.

22. The applicant's immediate commander formally recommended his discharge under the provisions of Army Regulation 635-200, Chapter 13, based on unsuitability. The commander noted the applicant was apathetic and unwillingness to serve. Due to his apathy, negative attitude, and intentional AWOL he will continue to be of negative value to the military service.

23. On 8 April 1975, the separation authority approved the recommended discharge and directed a General Discharge Certificate be issued.

24. The applicant was discharged on 10 April 1975. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, paragraph 13-5b (3), with Separation Program Designator JMJ (unsuitability) and RE code RE-3 and 3B. His service was characterized as under honorable conditions (general). He completed 3 months and 27 days of net active service this period. He lost 224 days of service.

25. Chapter 13, in effect at the time established policy and provided procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service. It provided for the separation of individuals for unsuitability whose record evidenced apathy (lack of appropriate interest), defective attitudes, and an inability to expend effort constructively. When separation for unsuitability was warranted, an honorable or general discharge was issued as determined by the separation authority based upon the individual's entire record.

26. During his initial period of service, the applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

27. The applicant petitioned the Army Discharge Review Board (ADRB) for a discharge upgrade. On 7 August 1980, the applicant withdrew his application due to the serious illness of his son.

28. On 3 November 1981, the ADRB considered the applicant's request and determined he was properly discharged and denied his request for a change in the type and nature of his discharge.

29. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

#### BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, the reason for his separation and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of evidence, the Board determined the character of service the applicant received upon separation in 1970 was not in error or unjust.

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 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.

3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Service Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) 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//