

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 October 2023

DOCKET NUMBER: AR20230003035

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge. Additionally, he requests an 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)
- 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 that on the Friday before all this happened, he received a call from a family member that his father was in the hospital in Yuma, AZ, with prostate cancer. He told his friend and he offered to give him a ride down to Yuma from Fort Ord, CA. On the way down, the engine was blown, and they were stuck. He went to see his dad then called back to base on Saturday to ask for a few days to get things straightened out. Since it was the weekend the sergeant in charge denied his request. On Monday morning the Military Police (MP) knocked on the door and took him to Yuma Proving Grounds then to a jail in Phoenix. He was housed there for 9 days before he was sent back to Fort Ord. At that time, he was held in a barracks type cell. A guy came to talk to him to inform him that he was going to be discharged and that he would be free to go home to see his dad. He wasn't given much information what the discharge would be, but he talked to someone who said it was ok and not to worry. This would never have happened if his father wasn't sick. His father did pass of prostate cancer. He is very proud of serving and his time in the service.

3. The applicant enlisted in the Regular Army on 2 December 1975 for three years. His military occupational specialty was 36K (Tactical Wire Operations Specialist).

4. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 31 May 1977 for:

- operating a vehicle in a reckless manner by accelerating rapidly and squealing the tires and going towards the battery formation in speed in excess of 10 miles per hour on or about 2 May 1977
- without authority absenting himself from his place of duty (Education Center) on or about 11 May 1977, and on or about 12 May 1977
- his punishment consisted of reduction to private 2/E-2, forfeiture of \$97.00 pay, and extra duty

5. The applicant accepted NJP under Article 15 of the UCMJ on 28 June 1977 for:

- without authority, failing to go at the time prescribed to his appointed place of duty on or about 4 June 1977
- without authority absenting himself from his unit on or about 26 May 1977, and on or about 27 May 1977
- his punishment consisted of reduction to private/E-1 (suspended), forfeiture of \$25.00 and extra duty
- the suspension was vacated on 10 November 1977

6. The applicant was absent without leave (AWOL) on 18 November 1977.

7. DA Form 3975 (Military Police Report) shows the applicant entered the Military Police Station and declared that he was AWOL since 18 November 1977.

8. The Incident/Complaint Report, dated 20 November 1977 shows the applicant showed disrespect to a commissioned officer (military policeman) and that the applicant spun the tires of a vehicle and fish tailed the vehicle in an erratic manner and stated words to the effect of bs\_\_ and raced off across the sand area. The vehicle was impounded as a result of being involved in a reckless driving charge, not having written permission to drive the vehicle from the owner, and disrespect to a commissioned officer.

9. The applicant was confined by military authorities on 20 November 1977, and he was AWOL on 22 November 1977. He was confined by military authorities 23 November 1977.

10. DA Form 3975 shows the applicant surrendered to the Yuma Proving Grounds MPs on 23 November 1977. He was transferred to jail awaiting travel back to his unit on or about 30 November 1977. He was present for duty on 30 November 1977.

11. Court-martial charges were preferred against the applicant on 30 November 1977 for violations of the UCMJ. His DA Form 458 (Charge Sheet) shows he was charged with:

- AWOL on or about 18 November until on or about 20 November 1977
- AWOL on or about 22 November until on or about 23 November 1977
- behaving himself with disrespect toward a commissioned officer on or about 20 November 1977
- willfully disobeying a lawful order on or about 20 November 1977

12. On 7 December 1977, the applicant's immediate commander and chain of command recommended trial by special court martial.

13. The applicant consulted with legal counsel on 19 December 1977 and was advised of the basis for the contemplated trial by court-martial for an offense punishable by a bad conduct discharge or a dishonorable discharge, the maximum permissible punishment authorized under the UCMJ, the possible effects of a request for discharge, and of the procedures and rights available to him.

a. Subsequent to consultation with legal counsel, he requested discharge under the provisions of Army Regulation (AR) (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service-in lieu of trial by court-martial. In his request for discharge, he indicated he was making the request of his own free will and he had not been subjected to any coercion whatsoever by any person. He understood 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 discharge or a dishonorable discharge.

b. He also indicated he did not desire any further rehabilitation under any circumstances because he had no desire to perform further service. He acknowledged he understood if his discharge request was approved, he could be deprived of many or all Army benefits and he could be ineligible for many, or all benefits administered by the Veterans Administration; he acknowledged he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He elected to submit a statement in his own behalf. He stated he would like to be discharged from the Army on a Chapter 10. He disliked the military service, and he would probably continue to get in trouble.

14. The applicant's immediate commander recommended approval of his request for discharge on 21 December 1977, and noted the applicant was pending trial by special court martial for AWOL, disrespect to a commissioned officer, and failure to obey a lawful order from a military policeman. He was a substandard Soldier whose continued

presence in the Army would cause a detrimental effect on the moral and discipline of the unit. His chain of command recommend approval and that he should be separated immediately under less than honorable conditions.

15. The separation authority approved the applicant's request for discharge on 10 January 1977, in lieu of trial by court-martial. He directed an UOTHC characterization of service.

16. A Statement of Medical Condition shows there had been no change in the applicant's medical condition since his last separation examination on 16 December 1971.

17. The applicant was discharged on 20 January 1978. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service in lieu of trial by a court-martial. He was assigned Separation Program Designator code JFS and Reenlistment Code 4. His service was characterized as UOTHC. He completed 2 years, 1 month, and 7 days of net active service. He had 12 days of lost time.

18. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

19. 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 applicant's request for a personal appearance 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 before the Board 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 and clemency in determining discharge upgrade requests. The Board noted the multiple offenses leading to the applicant's separation, the severity of the misconduct and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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. AR 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. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards and Service Boards for Correction of Military/Naval Records (BCM/NR) on 25 July 2018 [Wilkie Memorandum], 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 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 grounds.

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, 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//