

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 December 2023

DOCKET NUMBER: AR20230004605

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions character of service to honorable.

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

- DD Form 293 (Application for the Review of Discharge)
- self-authored statement, 15 February 2012

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, that he believes he is entitled to an honorable character of service.

a. He joined the Army National Guard (ARNG) in November 1971, before he could be drafted, and he served in this capacity until 27 July 1973. He served in the ARNG for approximately 6 months prior to enlisting in the Regular Army; he was experiencing a financial hardship and he thought he would earn more money in the regular Army.

b. He previously completed basic combat training (BCT) and advanced individual training (AIT) when he was in the ARNG, but he was required to complete BCT and AIT all over again after enlisting in the regular Army.

c. He graduated training he was at Fort Sill, OK awaiting orders to go to Frankfurt Germany. His wife, who was sick at the time with a bad heart, asked him not to leave her while she was sick. He went to the record department and had his orders to Germany flagged; after his orders to Germany were stopped, he was sent to the Fort Riley, KS retraining brigade. The personnel at the retraining brigade treated he and

other Soldiers badly; they were required to again complete BCT, and they were under fed. Some of the men went absent without leave (AWOL), but he stayed. The personnel there told him to put in for an undesirable discharge, and he did; they said he could get an upgrade of his characterization of service to honorable, but he never received the upgrade.

3. A DD Form 214 (Armed Forces of the United States Report of Transfer of Discharge) shows:

a. The applicant enlisted in the ARNG in October 1971 and entered initial active duty for training on 7 December 1971.

b. He was released from active duty in accordance with (IAW) paragraph 25 of Army Regulation 635-212 and returned to the control of his State, on 29 April 1972.

c. He had lost time due to AWOL during the following periods:

- 7 March 1972 - 15 March 1972 (9 days)
- 3 April 1972 - 12 April 1972 (10 days)

d. Block 30 (Remarks) reads - "Released from active duty and returned to state control as a member of the Army National Guard of Louisiana to complete remaining service obligation of 5 year, 6 months, and 4 days. 4 months and 23 days of ACDUTRA [Active Duty Training]... Individual considered untrainable and returned to state control for discharge in accordance with AR 635-212."

4. The record does not include evidence showing when the applicant was discharged from the ARNG.

5. A DA Form 4 (Enlistment Contract) shows the applicant enlisted in the regular Army on 27 July 1973. This form contains the following entries:

- block 48 of this form shows the applicant enlisted for an assignment at Fort Sill, OK in military occupational specialty 94B (Cook)
- block 49 (Prior Service) contains the entry "NA."

6. On 11 April 1974, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for the below misconduct:

a. The applicant absented himself without authority from his appointed place of duty, the mess facility, from on or about 0630 hours on 7 April 1974 to on or about 0800 hours on 7 April 1974.

b. The applicant absented himself without proper authority from his place of duty, the mess facility, from on or about 0430 hours on 8 April 1974 until on or about 0630 hours on 8 April 1974.

c. The applicant did, at on or about 0630 on 8 April 1974, wrongfully appear at the mess facility in dirty mess whites without having shaved.

d. His punishment consisted of his reduction to the rank/grade of private (PVT)/E-1 (suspended for 30 days) and forfeiture of \$50.00.

7. On 11 April 1974, the applicant accepted NJP under the provisions of Article 15, UCMJ, because it was reported that on or about 1130 hours on 1 July 1974, the applicant, without authority absented himself from his place of duty at the mess hall. His punishment consisted of a reduction to the rank/grade of PVT/E-1 (suspended), extra duty for 10 days, and forfeiture of \$60.00.

8. On 6 August 1971, the applicant accepted NJP under the provisions of Article 15, UCMJ for the below misconduct:

a. On or about 29 July 1974, the applicant, having knowledge of a lawful order issued by Captain (CPT) B to get a haircut, and order which was his duty to obey, did fail to obey the same.

b. It was reported that on or about 0800 hours on 31 July 1974, the applicant did, without authority absent himself from his place of duty and did remain so absent until on or about 1000 hours on 1 August 1974.

c. His punishment consisted of forfeiture of \$100.00 per month for a period of 1 month.

9. Two DA Forms 4187 (Personnel Action) show the following changes to the applicant's duty status:

- 1 September 1974 - present for duty (PDY) to absent without leave (AWOL)
- 10 September 1974 - AWOL to PDY

10. Special Court Martial Order (SCMO) Number 57, dated 13 November 1974 shows:

a. The applicant was arraigned, tried, and convicted of the below charge(s) and specification(s), pursuant to his pleas and findings of guilty:

(1) Charge I, Violation of the UCMJ, Article 90 (Assaulting or Disobeying a Superior Officer), Specification: in that the applicant did, having received a lawful

command from CPT F, his superior commissioned officer to put the bottle down, did willfully disobey the same.

(2) Charge II, Violation of the UCMJ Article 92 (Failure to obey an order or regulation) -

(a) Specification 1: In that the applicant, having received a lawful order from First Sergeant (1SG) M, his superior noncommissioned officer (NCO) to put the bottle down did willfully disobey the same.

(b) Specification 2: In that the applicant did, on or about 1845 hours on 30 September 1974, was disrespectful in language toward Sergeant (SGT) K, his superior NCO, who was then in the execution of his office, by saying to him, "You Bastard, Son-of-a Bitch, MotherFucker," or words to that effect.

b. His sentence, which was adjudged on 6 November 1974, included confinement at hard labor for 3 months.

c. On 13 November 1974, the sentence was approved and ordered to be executed.

11. His DA Form 20 (Enlisted Qualification Record) shows he was reduced to the rank/grade of private (PV1)/E-1 on 13 November 1974, by authority of SCMO Number 57, 13 November 1974.

12. A report of mental status evaluation, dated 24 December 1974, shows the applicant was receiving a mental health evaluation because he was being considered for separation due to unfitness. The evaluation report shows the applicant did not have any significant mental illness, he was considered mentally responsible and able to distinguish between right from wrong and adhere to the right. The report also shows the applicant had the mental capacity to understand and participate in Board processing, and he met the medical standards for retention.

13. The applicant received a physical which found he was qualified for separation.

14. A memorandum, dated 3 January 1975, subject: Separation under the provisions of Chapter 13 (Separation for Unfitness or Unsuitability), Army Regulation 635-200 (Personnel Separations-Enlisted Personnel), shows the applicant, having been advised by his consulting counsel of the basis for the contemplated action to accomplish his separation for unfitness, under the provisions of Army Regulation 635-200, chapter 13, and of its effects; of the rights available to him; and of the effect of any action taken by the applicant in waiving his rights, made the following elections and acknowledgments:

a. He waived consideration of his case by a Board of officers and a personal appearance before a Board of officers.

b. He elected not to submit statements in his own behalf, and he waived representation by counsel.

c. He understood he could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him and he understood that as the result of the issuance of an undesirable discharge under conditions other than honorable, he may be ineligible for many or all benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life.

15. A memorandum from the applicant's immediate commander, dated 3 January 1975 formally requested the applicant's separation under the provisions of Army Regulation 635-200, chapter 13, for unfitness. The commander notes the applicant's conduct and efficiency ratings were unsatisfactory, and further states:

a. He recommended the applicant's discharge from the service as unfit because of frequent incidents of a discreditable nature. The commander did not feel a discharge for unsuitability was appropriate because the applicant's behavior was not due to an inability to satisfactorily perform within the meaning of unsuitability.

b. The applicant's record reflects the highest rank he held was private(PV2)/E-2, He was convicted by 1 court-martial, and he received NJP under the provisions of Article 15, UCMJ on 3 occasions.

c. The applicant was sent to the brigade for the purpose of receiving the correctional training and treatment necessary to return him to duty as a well-trained Soldier with improved attitude and motivation. However, his actions since arrival preclude accomplishment of the objective as evidenced by his resume of behavior, attitude, and ability. The applicant demonstrated little desire for returning to duty. He has also received counseling by members of the leadership team and members of professional staff agencies. The commander was of the opinion that the applicant possessed the mental and physical ability necessary to be an effective Soldier, but his record at the time and his failure to react constructively to the rehabilitation program were indicative that he should not be retained in the service.

d. The commander further notes the applicant received considerable counseling since his arrival at the retraining facility by social workers, the leadership team, and unit cadre. The applicant had not responded favorably to the counseling nor to the duties given to him. The commander did not feel the applicant met the criteria for further rehabilitation attempts.

e. The applicant's resume of conduct, performance, and discreditable acts, includes the following indiscipline:

- 11 April 1974 - Article 15, AWOL
- 6 August 1974 - Article 15, disobeying a lawful order
- 22 October 1974 - statement of misconduct, disrespect to cadre personnel, and refusing a lawful order
- 6 November 1974 - Special Court-martial, disobeying the lawful orders of a commissioned and non-commissioned officer
- 20 November 1974 - statement of misconduct, disrespect to an NCO, disobeying a lawful order, and using obscene language
- 2 December 1974 - sleeping in class
- 3 December 1974 - failure to follow instructions
- 5 December 1974 - sleeping in class
- 6 December 1974 - failed in-ranks inspection
- 7 December 1974 - failed to follow instructions
- 10 December 1974 - failed B Module
- 10 December 1974 - failed night inspection
- 11 December 1974 - failed daily barracks inspection
- 12 December 1974 - displayed a negative attitude towards team NCO in charge (NCOIC)
- 12 December 1974 - failed night inspection
- 12 December 1974 - failed daily barracks inspection
- 12 December 1974 - displayed a negative attitude
- 13 December 1974 - failed daily barracks inspection
- 13 December 1974 - failure to comply
- 13 December 1974 - failed work call inspection
- 13 December 1974 - failed night inspection
- 16 December 1974 - failed B Module and recommended for unfitness discharge due to frequent incidents with team NCOIC
- 17 December 1974 - team commander recommended discharge for unfitness due to frequent incidents

16. On 3 January 1975, the applicant's intermediate commander recommended approval of the proposed action to discharge the applicant. This commander noted that the applicant was currently in confinement for a period of 3 months, and he would be released on or about 21 January 1975.

17. On 6 January 1975, the separation authority directed the applicant's discharge under the provisions of Army Regulation 635-200, chapter 13, for unfitness. The separation authority further directed the applicant be furnished an undesirable discharge certificate.

18. On 8 January 1975, the applicant was discharged under the provisions of Army Regulation 635-200, paragraph 13-5a(1). His DD Form 214 shows he received an under other than honorable conditions character of service, a separation code of "JLB," and a reenlistment code of "RE-3." Additionally, he completed 1 year, 1 month, and 26 days of net active service, with 106 days of lost time, and he was awarded or authorized the National Defense Service Medal.

19. A letter from the Army Discharge Review Board (ADRB), dated 30 July 1981, informed the applicant, after careful consideration of his military record and all other available evidence, the ADRB determined he was properly discharged; and denied his request for a change in the type and nature of his discharge.

20. Soldiers were subject to separation under the provisions of Army Regulation 635-200, paragraph 13-5a(1) for unfitness for frequent incidents of a discreditable nature with civil or military authorities. An under other than honorable conditions character of service was usually considered appropriate.

21. The applicant provided argument and/or evidence the Board should consider, along with the applicant's overall record, in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application, supporting documents, evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, applicable regulatory guidance and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the misconduct, court-martial charges and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, and, in the absence of post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined the applicant was 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 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 635-200 (Personnel Separation-Enlisted Personnel) in effect at the time, provided for the administrative separation of Soldiers for a variety of reasons.

a. Paragraph 1-9d provided, an honorable discharge is a separation with honor. Issuance of an honorable discharge will be conditioned upon proper military behavior and proficient performance of duty during the member's current enlistment.

b. Paragraph 1-9e provided, a general discharge is a separation from the Army under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 13 established the policies and provided procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service.

(1) An individual was subject to separation under the provisions of paragraph 13-5a(1) for unfitness for frequent incidents of a discreditable nature with civil or military authorities.

(2) Paragraph 13-28 provided that when an individual is to be discharged as unfit and is issued an undesirable discharge, the convening authority will direct his immediate reduction to the lowest enlisted grade.

(3) Paragraph 13-31 provided that An individual separated by reason of unfitness will be furnished an undesirable discharge certificate, except that an honorable or general discharge certificate may be issued if the individual has been awarded a personal decoration or if warranted by the particular circumstances in his case.

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 (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//