

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 November 2023

DOCKET NUMBER: AR20230004795

APPLICANT REQUESTS: reconsideration of his request for upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general). Additionally, he requests personal appearance before the Board.

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20080010346 on 4 November 2008.
2. The applicant states, in effect that his discharge was unjust because of racism and due to the fact that others that used drugs were given a Chapter 5 discharge. He was not represented properly.
3. The applicant enlisted in the Regular Army on 25 October 1977. Upon completion of training, he was awarded military occupational specialty 05C (Radio Teletype Operator).
4. On 16 October 1978, the applicant was reported as absent without leave and remained absent until he surrendered to military authorities on 18 October 1978.
5. On 24 May 1979, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for being derelict in the performance of his duties; he negligently failed to remain awake while on barracks duty, on or about 3 May 1979. His punishment included forfeiture of \$50.00 pay for one month and seven days extra duty.
6. On 2 October 1979, the applicant accepted NJP under Article 15 of the UCMJ, for willfully disobeying an order from his superior noncommissioned officer and using

disrespectful language towards his superior warrant officer, on or about 2 September 1979. His punishment included reduction in grade to E-2 and 30 days confinement.

7. Court-martial charges were preferred against the applicant on 10 April 1980, for violation of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of assaulting his superior noncommissioned officer by striking him in the face with his hand; two specifications of being disrespectful in language towards his superior noncommissioned officers; one specification of being drunk and disorderly in station; and one specification of wrongfully using provoking words and gestures towards a military policeman who was in the execution of his duties.

8. On 24 April 1980, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (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 acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge 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 was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He submitted a statement in his own behalf; however, his statement is not available for review.

9. The available record is void of the applicant's immediate commander's recommendation regarding his request for Chapter 10 discharge, for the good of the service – in lieu of trial by court-martial discharge.

10. By legal review, the applicant's Chapter 10 separation action was found to be legally sufficient for further processing.

11. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 29 April 1980, and directed his separation with a DD Form 794 (UOTHC Discharge Certificate).

12. On 2 May 1980, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

13. The applicant was discharged on 9 May 1980. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for administrative discharge conduct triable by a court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code JFS and Reentry Code 3b. He completed 2 years, 6 months, and 11 days of net active service this period with 2 days of lost time.

14. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 6 April 1992, the Board voted to deny relief and determined that his discharge was proper.

15. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 4 November 2008, the Board voted to deny relief and determined that the overall merits of the case were insufficient as a basis for correction of the record.

16. 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.

17. 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 hearing 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 hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application and all supporting documents, the Board found that relief was partially 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 of discharge upgrade requests. The Board considered the applicant's statement, record of service, the frequency and nature of the misconduct and the reason for separation. The Board found no clear or

convincing evidence of an error or injustice and, in the absence of any new or relevant information, concluded he was properly and equitably discharged in accordance with applicable regulatory and a recommendation for relief is not warranted.

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 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 to amend the decision by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20080010346 on 4 November 2008.



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 three 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 three-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.

a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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.

c. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.

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 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//