

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 13 January 2024

DOCKET NUMBER: AR20230004897

APPLICANT REQUESTS: The narrative reason for his separation be changed from "Unacceptable Conduct" to "Sufficient Service for Retirement" and a personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Chain of command recommendations for a filing determination on a General Officer Memorandum of Reprimand (GOMOR) (3)
- DA Form 1574-2 (Record of Proceedings by Board of Officers) for a Board of Inquiry (BOI) (19 pages)
- U.S. Army Trial Defense Service (USATDS) – West, Joint Base Lewis-McChord (JBLM) Field Office, JBLM, WA memorandum, Subject: Brief of Legal Errors Requiring Action on the BOI for [the applicant]
- U.S. Army Human Resources Command (USAHRC), Fort Knox, KY memorandum, Subject: Retirement in Lieu of Elimination/Grade Determination for Retirement
- DA Form 61-10-2 (Field Plate (O4 – O5; CW3 – CW5) Officer Evaluation Report (OER)) for the period from 14 March 2019 through 30 April 2020
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- State of Washington, Washington State Patrol, Olympia, WA letter
- South Carolina Law Enforcement Division (SLED) letter

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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:

a. The decision was made to eliminate him from active duty by a BOI for a reprimand involving an isolated incident. Army Regulation 600-8-24 (Officer Transfers and Discharges), Paragraph 4-1, explains the standards for officers to maintain for military service. If, an officer who will not or cannot maintain those standards will be separated. For derogatory information, Army Regulation 600-8-24 states that an officer's overall record be reviewed along with other known deficiencies for a pattern; to determine if elimination is required. The purpose of the board is to review all the information for a pattern showing that the officer either will not or cannot maintain the standards for service. It is his understanding that eliminations under Army Regulation 600-8-24 are not for an isolated incident.

b. He was separated for an isolated incident, as stated by his regimental and battalion commanders in their comments for filing recommendation (see attached document). Both his company and battalion commanders saw this was out of charter for him and recommended local filing of his reprimand. Not only was this an isolated incident, he was the individual being abused which is also stated in his regimental commander's comments. Additionally, his BOI did not take his military record into consideration with their decision, as stated in paragraph 1. a. in his memorandum on the legal errors (see attached). The new material attached indicates he has not been involved in any further incident. The new material is his last OER which shows his outstanding performance and that he lives the Army values. Next is a police report from Washington State (prior to moving) and his approved concealed weapons permit from South Carolina (current residence). These reports are evidence that he has no pending criminal charges, no protection order(s), and/or has not been charged with any crime.

3. The applicant served in the Regular Army as an enlisted Soldier from 15 October 1992 until 2 July 1997 when he was honorably discharged for the purpose of accepting appointment as a warrant officer in the Aviation branch as a pilot.

4. He was appointed as a Reserve warrant officer of the Army on 3 July 1997 and ordered to active duty for a period of 6 years. He served in a variety of positions, attended numerous courses, and attained the rank/grade of chief warrant officer five (CW5)/W-5, effective 9 November 2016. He deployed on numerous temporary duty missions in Afghanistan between 28 April 2008 and 3 April 2017.

5. The applicant was divorced from his first wife on 9 March 2012. He married his second wife on 15 July 2017.

6. On 8 October 2017, a local administrative flag was imposed on the applicant to prevent favorable personnel actions. The catalyst for this action was the fact that he was pending adverse action.

7. An investigation was conducted under the provisions of Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) to determine the facts and circumstances surrounding verbal and physical domestic violence between the applicant and his wife at any time during their relationship. The investigating officer (IO) found that a preponderance of the evidence supported the allegations that the applicant assaulted his wife on 8 October 2017 by grabbing her around the neck in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). The IO recommended the Command take appropriate disciplinary action and/or adverse administrative action against the applicant.

8. On 3 July 2018, the Regimental Judge Advocate determined the investigation was legally sufficient in accordance with regulatory requirements. He recommended approval of the investigation findings and recommendations.

9. On 7 August 2018, the applicant received a GOMOR from the Commanding General, I Corps, JBLM, WA for domestic violence. Specifically, on 8 October 2017, the applicant was involved in a verbal altercation with his wife that turned physical, during which he conducted a foot sweep maneuver on her, knocking her down, and choked her. The CG advised the applicant that he was considering whether to direct the GOMOR be filed permanently in his Army Military Human Resource Record (AMHRR) and afforded him an opportunity to present matters in his own behalf prior to deciding.

a. The applicant's company commander recommended placing the GOMOR temporarily in his local unit file for a period of 18 months or until he was reassigned outside the CG's General Court-martial Convening Authority (GCMCA) jurisdiction. He stated the applicant had been honest and forthcoming throughout the investigation and he believed the applicant had accepted responsibility and genuinely regretted his actions.

b. The applicant's battalion commander recommended placing the GOMOR temporarily in his local unit file for a period of 18 months or until he was reassigned outside the CG's GCMCA jurisdiction. He stated he felt this was an isolated incident as a result of a dysfunctional relationship, and not a norm for the applicant. He made a mistake and took responsibility for his actions. He believed the applicant deserved a second chance.

c. The applicant's regimental commander recommended permanently filing the GOMOR in the applicant's AMHRR. He stated the incident occurred more than a year prior while involved in a dysfunctional relationship where there was a demonstrated history of his wife assaulting him. Now that the relationship had ended, there was an extremely low likelihood of recurrence. The applicant's matters were compelling, his service to his country had been exemplary and yet, by his own admission, he suffered a significant lapse in judgement that deserved to be recorded.

d. On 12 October 2018, the CG directed that the GOMOR be placed permanently in the applicant's AMHRR.

10. The applicant's OER rendered for the period from 14 March 2018 through 13 March 2019 shows he received very favorable comments and ratings from both his rater and senior rater. There was no mention of misconduct.

11. Following a period of legal separation, the applicant's divorce from his wife was finalized on 10 June 2019.

12. A Board on Inquiry (BOI) convened on 27 February 2019 to determine whether the applicant should be eliminated from the Army under the provisions of Army Regulation (AR) 600-8-24 (Officer Separation), paragraphs 4-2b(5) and c, because of acts of personal misconduct, and adverse information filed in his Army Human Resource Record. The BOI:

a. Findings: Having carefully considered the evidence before it, the BOI finds the allegation that, on or about 8 October 2017, the applicant was involved in a verbal altercation with his wife that turned physical, during which the applicant conducted a foot sweep maneuver on her, knocking her down, and then choked her, is supported by a preponderance of the evidence. This finding warrants his elimination.

b. The allegation that the applicant has substantiated derogatory activity that was filed in his Army Military Human Resource Record (AMHRR), as a result of a GOMOR, dated 7 August 2018, which was filed in his AMHR is supported by a preponderance of the evidence. This finding also warrants the applicant's elimination.

13. On 15 March 2019, after reviewing the record of proceedings for the BOI under the standards set forth in AR 600-8-24, an administrative law attorney found he board's proceedings to be legally sufficient.

14. On 25 April 2019, by memorandum, Subject: Officer Elimination, to the U.S. Army Human Resources Command, the Commanding General, I Corps, indicated he reviewed the enclosed packet concerning the applicant, to include the supporting evidence and the respondent's rebuttal matters. In considering respondent's rebuttal matters, he finds the allegations could have been raised by the respondent during the board proceedings, but the respondent failed to do so. Accordingly, he finds that these errors are not substantial and are therefore harmless in accordance with AR 15-6, paragraph 3-20d. Additionally, he finds the allegation that the board did not deliberate long enough is baseless. After careful consideration of all matters, he recommended the applicant be eliminated from the United States Army. As the applicant is retirement eligible under 10 U.S.C. 3911, the CG made no recommendation as to characterization of service pursuant to AR 600-8-24, paragraph 4-15b(2).

15. A memorandum, issued by the USAHRC, Fort Knox, KY, Subject: Retirement in Lieu of Elimination/Grade Determination for Retirement, dated 18 February 2020, shows the Deputy Assistant Secretary of the Army (Review Boards) (DASA(RB)), approved the applicant's retirement in lieu of elimination and directed that he be retired in the rank/pay grade of chief warrant officer four/W-4. The effective date of his retirement would be 30 April 2020 and he would be placed on the retired list on 1 May 2020. He would be given a Separation Program Designator (SPD) Code of "RNC" with an honorable characterization of service. In regard to the calculation of his retired pay under the provisions of Title 10 USC subsections 1370 and 1407(f), the DASA (RB) determined his service in the rank/grade of CW5/W-5 was not satisfactory.

16. The applicant's OER rendered for the period from 14 March 2019 through 30 April 2020 shows he received very favorable comments and ratings from both his rater and senior rater. There was no mention of misconduct.

17. Orders and his DD Form 214 show he was retired accordingly on 30 April 2020. He was credited with completion of 22 years, 9 months, and 28 days of net active service this period. His characterization of service was Honorable. The authority for his separation was Army Regulation 600-8-24, he was issued SPD Code "RNC" with narrative reason for separation of "Unacceptable Conduct." He was awarded or authorized the:

- Meritorious Service Medal (2nd award)
- Air Medal with Valor Device
- Air Medal (4th award)
- Army Commendation Medal (4th award)
- Army Achievement Medal (4th award)
- Meritorious Unit Commendation (2nd award)
- U.S. Air Force (USAF) Meritorious Unit Award Ribbon (2nd Award)
- U.S. Army/USAF Presidential Unit Citation
- Army Superior Unit Award
- Army Good Conduct Medal
- National Defense Service Medal (2nd award)
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Afghanistan Campaign Medal with 4 Campaign Stars
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon
- North Atlantic Treaty Organization Medal (2nd Award)
- Combat Action Badge
- Master Aviator Badge

- Basic Aviation Badge
- Parachutist Badge
- Air Assault Badge
- Driver and Mechanic Badge with Mechanic Bar

18. In addition to the previously discussed evidence, the applicant provides the following documents that are available in their entirety for the Board's consideration:

a. USATDS – West, JBLM Field Office, JBLM, WA memorandum, Subject: Brief of Legal Errors Requiring Action on the BOI for [the applicant], dated 5 April 2019, shows the applicant respectfully requested that the BOI's recommendation be disapproved and that he be retained in the Army. Counsel noted that the BOI President specifically stated that the BOI did not review his past service and that enclosed with this submission was a cost estimate of \$13,000,000.00 for the training invested in the applicant to train for and maintain Flight Lead Status in his unit. Counsel also stated several substantial errors occurred in the case and that they could not be corrected without substantial prejudice to the applicant.

(1) The first error: The BOI President did not comply with Army Regulation 600-8-24, in that the BOI President did not follow the rulings of the Legal Advisor, made comments indicating lack of partiality during the BOI, and specifically stated that the BOI did not consider the applicant's past service.

(2) Second error: The BOI Members did not adequately review documentary evidence.

(3) Third error: The BOI failed to swear the Recorder's key witness, the applicant's wife, for her testimony. This error substantially prejudiced the applicant because the board admitted the court transcript of the applicant, and not his wife, as an exhibit. The Recorder then argued the significance of the transcript of the applicant. This error is compounded because the transcript of the proceedings was subsequently vacated, and the civilian court determined that the applicant was entitled to a new hearing.

b. A letter rendered by a staff member of the Identification and Background Check Section, State of Washington, Washington State Patrol, Olympia, WA on 25 August 2021 shows there was no conviction criminal history record information in the Washington State Patrol Criminal Records Division files pertaining to the applicant at the time.

c. A letter rendered by a staff member of the SLED, Columbia, SC on 10 November 2022, shows the applicant was issued a Concealed Weapon Permit.

19. In reaching its determination, the Board shall consider the applicant's petition, available record, and/or submitted documents in support of the petition. An applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

BOARD DISCUSSION:

1. The Board determined 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, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows an AR 15-6 found that a preponderance of the evidence supported the allegations that the applicant assaulted his wife on 8 October 2017 by grabbing her around the neck in violation of Article 128 of the UCMG. As a result, the applicant received GOMOR for domestic violence. The GOMOR triggered a BOI which found the applicant's offenses warranted separation. Since he was retirement eligible, his retirement request was approved. However, the specific reason for his separation remained his unacceptable conduct. All requirements of law and regulation were met, and the rights of the applicant were fully protected throughout the separation process. The Board found no error or injustice regarding his separation processing. Additionally, the Board was not persuaded by the applicant's arguments regarding the BOI. The Board found his concerns were addressed by the CG of I Corps prior to sending the BOI's findings and recommendation for processing. Based on the preponderance of the evidence, the Board determined the narrative reason he received upon his retirement is 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.



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, USC, 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 regulation provides that 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. It is not an investigative body.

The ABCMR may, in its discretion, hold a hearing. 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 600-8-24, in effect at the time of the applicant's service, prescribed policies and procedures governing transfer and discharge of all commissioned and warrant officers of the Active Army, The Army National Guard of the U.S., and the U.S. Army Reserve when serving on active duty for a period of 30 or more consecutive days unless otherwise stated. This regulation included policy statements, operating tasks, rules in support of operating tasks, and sequential steps or each operating task. Chapter 4 pertains to eliminations.

a. Paragraph 4-2b provided elimination action could be or would be initiated against an officer as a result of misconduct, moral or professional dereliction, or in the interests of national security:

- Discreditable or intentional failure to meet personal financial obligations
- Mismanagement of personal affairs that are unfavorably affecting performance of duty
- Mismanagement of personal affairs to the discredit of the Army
- Intentional omission or misstatement of fact in official statements or records for the purpose of misrepresentation
- Acts of personal misconduct
- Alcohol and drug-related misconduct
- Intentional neglect of or failure to perform duties
- Conduct unbecoming an officer
- Conduct or actions that result in the loss of a professional status
- Drug dependent or identified as having committed an act of personal misconduct involving drugs
- Act of child/spouse maltreatment or abuse and/or other acts of family violence
- Failure of a course at a service school because of misconduct, moral or professional dereliction
- Conviction by court-martial that did not impose a punitive discharge for a sexually violent offense

b. Paragraph 4-2c provided the following reasons require an officer's record to be reviewed for consideration of terminating appointment. Standing alone, one of these conditions may or may not support elimination, however, this derogatory information combined with other known deficiencies form a pattern that, when reviewed in conjunction with the officer's overall record, requires elimination.

- Punishment under UCMJ, Article 15

- Conviction by court-martial.
- The final denial or revocation of an officer's Secret security clearance by appropriate authorities
- A relief for cause OER
- Adverse information filed in the AMHRR
- Failure of a course at a service school
- Any substantiated adverse finding or conclusion from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions).

4. Army Regulation 635-5-1 (Personnel Separations – SPD Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. It states that the separation code "RNC" is an appropriate code to assign to Soldiers retired under the provisions of Army Regulation 600-8-24, Paragraph 4-2 and Paragraph 4-20, by reason of unacceptable conduct in cases of retirement in lieu of elimination.

5. 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, 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//