

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 August 2023

DOCKET NUMBER: AR20230005163

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions (UOTHC).

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

- DD Form 149, Application for Correction of Military Records, 3 February 2023
- DD Form 214, Report of Separation from Active Duty, 3 August 1978

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 file timely.
2. The applicant states, that upon leaving his Advanced Individual Training as a private first class (PFC)/E-3, he reported to his first duty station in Wiesbaden, Germany; he received 3 letters of recommendation during the period of his military service.
 - a. He asserts he experienced racial prejudice because he was a black man who was promoted to the rank/grade of PFC/E-3; he was not well liked by his fellow soldiers nor by the officers at his duty station.
 - b. He contends his leadership threatened him into signing his discharge paperwork. He maintains he was young at the time and not afforded council or an opportunity for court proceedings to prove his innocence. He states, he was threatened with two choices, prison time or signing out of the military; as a result of being threatened with prison time and having no counsel, he signed discharge paperwork in the first sergeant's office.
3. The applicant enlisted in the Regular Army on 15 April 1976 for 6 years at the rank/grade of private one (PVT)/E-1. The highest rank he attained while serving was private first class (PFC)/E-3.

4. A DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ), dated 7 July 1977, shows the applicant received nonjudicial punishment (NJP) for wrongfully possessing a homemade smoking pipe containing marijuana residue. The applicant's punishment included a reduction in rank/grade from PFC/E-3 to private two (PV2)/E-2, forfeiture of \$175.00 per month for two months, and 30 days of extra duty.

5. His DA Form 2-1 (Personnel Qualification Record (PQR)) shows he was again promoted to PFC/E-3 on 1 March 1978.

6. A DA Form 268 (Report of Suspense of Favorable Personnel Action (Flag)) shows the applicant's immediate commander initiated a flag against the applicant on 2 June 1978, because he was pending a court-martial. The following documents were included as attachments to the flagging action:

a. The following witness statements effectively state:

(1) Second Lieutenant F reported, when he encountered the applicant on 2 June 1978, he noticed the applicant was wearing a field jacket liner as an outer garment. He ordered the applicant to return to the barracks and remove the field jacket liner. They argued, and when they parted, 2LT F noticed the applicant was not returning to the barracks, but instead heading to the mess hall wearing the field jacket liner. The applicant refused to abide by the direct order, stating in effect, since no one else witnessed the disobedience there is no way to prove it happened; then the applicant walked away.

(2) On 8 June 1978, Sergeant (SGT) H witnessed the applicant being "hostile in language" against SSG D, SSG D's wife, child, mother, and father. He also stated that the applicant threatened to damage SSG D's vehicle. SSG D ordered the applicant to leave the CONNEX. SGT H identified two other military members in the CONNEX that were present. The witness also stated they did not observe anything on the part of SSG D to provoke the behavior and communication of the applicant.

b. A DD Form 458 (Charge Sheet), dated 20 June 1978, shows the following court-martial charges were preferred against the applicant:

(1) Charge I, Violation of UCMJ, Article 90 (Disobeying a Commissioned Officer), Specification: In that the applicant, having received a lawful command from 2LT F, his superior commissioned officer, to take his field jacket liner back to the barracks, on or about 7 am., 2 June 1978 willfully disobeyed the same.

(2) Charge II, Violation of UCMJ, Article 91, (Disobeying a Non-Commissioned Officer):

(a) Specification 1: In that the applicant did, having received a lawful order from SSG D, his superior noncommissioned officer, to get out of bed because of an alert, did, on or about 1:00 am., 2 June 1978, willfully disobey the same.

(b) Specification 2: In that the applicant, having received a lawful order from SSG D, his superior noncommissioned officer, to leave the CONEX and go back to work, did, on or about 3:20 pm., 8 June 1978, willfully disobey the same.

(3) Charge III, Violation of UCMJ, Article 117, (Use of provoking words toward a Non-Commissioned Officer), Specification: In that the applicant did, on or about 3:30 pm., 8 June 1987, wrongfully use provoking words, to wit: "your father is a bastard and your mother and wife are whores," or words to that effect, towards SSG D.

(4) Charge IV, Violation of UCMJ, Article 134 (Communicating a threat to do bodily harm toward a Non-Commissioned Officer), Specification: In that the applicant did, on or about 3:20 pm., 8 June 1978, wrongfully communicate to SSG D, a threat to do bodily harm to SSG D's wife and daughter while he was in the field.

c. A DA Form 2627 dated 30 June 1978 shows the applicant received NJP for the following misconduct, which resulted in his reduction to the rank/grade of PV2/E-2:

(1) On or about 6:15 am., 20 June 1978, the applicant having received a lawful order from Sergeant (SGT) Y, his superior commissioned officer, to pick up the broom and continue sweeping the dayroom, did willfully disobey the same.

(2) On or about 6:15 am., 20 June 1978, the applicant was disrespectful in language to SGT Y, his superior noncommissioned officer, who was then in the execution of his office, by saying to him, "I'm not picking up no damn broom and I ain't doing no damn sweeping."

7. His record does not contain a separation packet; however, it does contain his DA Form 2-1 and a duly constituted DD Form 214.

a. The applicant's DA Form 2-1 includes a pen and ink change annotating his reduction in rank to private 1 (PV1)/E-1 with an effective date of 20 July 1978.

b. The applicant was discharged on 3 August 1978, under the provisions of AR 635-200, chapter 10, in lieu of trial by court-martial, with an under other than honorable conditions characterization of service in the rank/grade of private (PV1)/E-1. He received a separation code of JFS and a reentry code of 3. His DD Form 214 shows

he completed 2 years, 3 months, and 11 days of active service, but does not list any personal decorations.

8. The applicant applied to the Army Discharge Review Board (ADRB) to request a change in the type and nature of his discharge. On 26 July 1982, the Board denied his request and determined that the applicant was discharged correctly.

9. Regulatory guidance in effect at the time provided discharges under the provision of Army Regulation 635-200, chapter 10, where voluntary requests from the Soldier to be discharged in lieu of a trial by court-martial.

10. The applicant provided argument 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:

1. 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.

2. A majority of the Board found the fact that court-martial charges were preferred against the applicant was an overreaction on the part of his chain of command when non-judicial punishment under Article 15, UCMJ, was an option. While the applicant did clearly exhibit a pattern of misconduct, a majority of the Board found the nature of his misconduct such that the under other than honorable conditions character of service was not warranted. A majority of the Board determined the applicant's character of service should be changed to under honorable conditions (general).

3. The member in the minority found insufficient evidence of in-service mitigating factors and noted 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 member in the minority determined the character of service the applicant received upon separation 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 Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general).

█

█ █

█
█

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, in effect at the time, set forth the primary authority for separating enlisted personnel.
 - a. Chapter 10 states in part, a member who has committed an offense or offenses, the punishment for any of which, under the Uniform Code of Military Justice (UCMJ) and

the Manual for Court-Martial, include bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. In addition, the request for discharge may be submitted at any stage in the processing of the charges until the court-martial convening authority's final action on the case. Commanders will also ensure that a member will not be coerced into submitting a request for discharge for the good of the Service. The member will be given a reasonable time (not least 72 hours) to consult with a consulting counsel and to consider the wisdom of submitting such a request for discharge.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. An under other than honorable discharge is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct and the good of the service.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness guided 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 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 provides standards and principles to guide Boards in the application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, the relative severity of the misconduct, mental and behavioral health conditions, an official governmental acknowledgment 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//