

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 March 2024

DOCKET NUMBER: AR20230005399

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 9 November 1984

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:

a. He served 6 years and 2 months in the Army. He reenlisted after his first term and planned to make the Army his career. After his reenlistment he was sent to Germany without his wife, she would come to Germany after she received orders. He met a German nationalist and began seeing her, he knew he was wrong and made a mistake. His wife arrived in Germany, and he tried to break off the relationship with the German national, but it did not go well. She accused him of sexual assault. He was detained, had a hearing, and was offered a discharge.

b. The officer in-charge knew that a lot of what was said, was false. He accepted the offer and 39 years later it is still affecting him in a negative way. He served his country and needs an upgrade of his discharge to receive help. He has been married to his same wife for 43 years and is a model citizen. He does not have an arrest record.

3. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 15 June 1978, he voluntarily took an oath of extension of his 3-year term of service to a 4-year term of service effective on 20 June 1978. He had an immediate reenlistment on 16 December 1981, he voluntarily took an oath of extension of his 3-year term of service to a 3.5-year term of service.

b. His DA Form 2-1 (Personnel Qualification Record – Part II) shows in item 5 (Overseas Service) the applicant served in Germany from 23 September 1978 to 18 September 1980 and from 25 April 1982 to 8 November 1984.

c. DA Form 3881 (Rights Warning Procedure/Waiver Certificate), dated 28 May 1984, shows the Criminal Investigation Division (CID) was interrogated the applicant in a suspected/accused rape sodomy/adultery assault.

d. Through DA Form 2823 (Sworn Statement), dated 28 May 1984, the applicant states he dated A_S_ prior to his wife arriving to Germany. He met with A_S_ and for the first time informed her that he was married and their relationship would need to end due to his wife and family relocating to Germany. A_S_ Became angry and this is why she made a complaint that he raped her. He did not rape her and was never at her apartment on 27 May 1984.

e. Through another sworn statement, dated 6 June 1984, the applicant states that he does not know that exact date that he went to meet with A_S_ but he met with her to tell her he was married and their relationship had to end. She became upset to find out he was married. He also informed her not to try and make any contact with him or his wife. She told him “[N]ot to worry because he will pay.” He was under the impression that she would just contact his wife or approach them when they were out, he did not rape her.

f. Through seven sworn statements, dated 7 June 1984, from fellow Soldiers in the applicant’s barracks, in which they state that on the date in question, 27 May 1984, the applicant did leave the barracks but did not say where he was going. On 5 and 6 June 1984, the applicant approached a fellow Soldier to ensure he would cover for him and say he was at the barracks on the date in question.

g. DA Form 2800 (CID Report of Investigation) final report with an illegible date shows through investigation, the applicant, between 2330 hours on 27 May 1984 and 0100 hours on 28 May 1984, who was legally married to A_I_ when he repeatedly struck A_S_ about the legs, tore her undergarments and raped her. The investigation also revealed that he solicited numerous members in his unit to make false statements reflecting that he was with them at the time of the rape.

h. On 22 December 1980, court-martial charges were preferred on the applicant for one specification of leaving his appointed place of duty on 27 May 1984, one

specification of rape of A_S) on 27 May 1984, and one specification of having sexual intercourse with A_S_, a woman not his wife on 27 May 1984, and two specifications of wrongfully soliciting Soldiers to give false sworn statements.

i. On 21 August 1984, after consulting with legal counsel, the applicant requested discharge for the good of the service under the provisions of Chapter 10, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel). He understood that he may request discharge for the good of the service because charges were preferred against him, each of which authorizes the imposition of a bad conduct or dishonorable discharge. He acknowledged:

- he was making the request of his own free will and have not been subjected to any coercion whatsoever by any person
- he has been advised of the implications that are attached to it
- by submitting this request, he acknowledged he was guilty of the charge against him or of a lesser included offense therein contain which also authorizes the imposition of a bad conduct or dishonorable discharge
- under no circumstances did he desire further rehabilitation, for he had no desire to perform further military service
- if his request for discharge is accepted, he may be discharged under conditions other than honorable
- he would be deprived of many or all Army benefits, that he may be ineligible for many or all benefits administered by the Veterans Administration, and that he may be deprived of his rights and benefits as a veteran under both Federal and State law
- he elected not to submit a statement in his own behalf

j. On 19 October 1984, consistent with the chain of command recommendations, the separation authority approved his request for discharge for the good of the service and directed his reduction to the lowest enlisted grade and discharge under other than honorable conditions with a Under Than Honorable Discharge Certificate (DD Form 794A).

k. The applicant was discharged from active duty on 9 November 1984 under the provisions of chapter 10 of AR 635-200 with an under other than honorable characterization of service (Separation Code KGS, Reentry Code 4). He completed 6 years, 4 months, and 25 days of active service. His DD Form 214 shows:

(1) He was awarded or authorized: Army Service Ribbon, Overseas Service Ribbon, Army Commendation Medal, Expert Badge with Hand Grenade, and Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)

b. The Remarks block lists his immediate reenlistment but does not show his continuous honorable service or whether he completed his first term of service.

4. His record contains a letter from the Army Discharge Review Board (ADRB), dated 24 August 1988, which shows after careful consideration of his military records and all other available evidence, the ADRB determined that he was properly and equitably discharged. His request for a change in the type and nature of discharge was denied.

5. By regulation (AR 635-200), a member who has committed an offense for which the authorized punishment includes a punitive discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. A discharge under other than honorable conditions is normally considered appropriate.

6. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance

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 partially warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The evidence shows the applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. He consulted with counsel and requested voluntary discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination.

b. The Board also determined the testimony of the person who accused the applicant is not credible. Additionally, the Board noted that the applicant was not prosecuted by the German judicial system or by the military Chain of Command. While the Board agreed that the applicant did commit adultery, the rape was not proven. In view of that, the Board determined his character of service is too harsh and should be upgrade to a general discharge under DOD liberal consideration, with no change to the narrative reason, authority, or corresponding codes.

c. The Board also noted that the applicant’s service from first date of enlistment to the date before his last reenlistment was honorable. For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, in addition to listing immediate reenlistment(s), an entry is required for continuous honorable service from first day of service for which DD Form 214 was not issued until date before commencement of current enlistment.

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:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant’s DD Form 214 for the period ending 21 September 2002, showing:

- Character of Service: Under Honorable Conditions
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change
- Remarks: Soldier Completed First Full Term of Service and Continuous Honorable Service from 1978-06-15 to 1981-12-15

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge.



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 Separations – Enlisted Personnel) 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.

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 based on 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.

4. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

5. Army Regulation 635-8 (Separations Processing and Documents), currently in effect, provides for the preparation and distribution of the DD Form 214. It states for item 18 (Remarks) to Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable", enter "Continuous Honorable Active Service from" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment).

//NOTHING FOLLOWS//