

IN THE CASE OF: ██████████

BOARD DATE: 7 February 2024

DOCKET NUMBER: AR20230007011

APPLICANT REQUESTS: an upgrade of his characterization of service from under honorable conditions to honorable.

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

- DD Form 149 (Application for Correction of Military Record), 6 April 2023
- self-authored statement
- DA Form 3836 (Notice of Return of U.S. Army Members from Unauthorized Absence), 2 April 1974
- Arrest Memorandum, 9 September 1974
- DD Form 214 (Report of Separation from Active Duty), 23 January 1975

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, at the time of his discharge he was given an option to be released, however he was unaware his discharge would become harmful in his life. His exemption for property tax has been audited and removed because the conditional discharge. He requests a discharge upgrade for continuation of exemptions for taxes.
3. The applicant enlisted in the Regular Army on 29 March 1973, for a 4-year period. Upon completion of his initial entry training, he was awarded military occupational specialty 11C (Infantry Indirect Fire Crewman). The highest rank he attained was private first class (PFC)/E-3.
4. The applicant went absent without leave (AWOL) on or about 26 February 1974 and was dropped from rolls on or about 1 April 1974. He surrendered to military authorities on or about 2 April 1974. On the same date he accepted non-judicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ). His

punishment imposed was reduction to the grade of private (PV2)/E-2 and forfeiture of \$75.00 pay for one month.

5. On 19 July 1974, he accepted non-judicial punishment under the provisions of Article 15, UCMJ, for failure to be at his appointed place of duty on or about 11 June 1974 and failure to appear in proper uniform on or about 28 June 1974. His punishment imposed was extra duty for 14 days and forfeiture of \$50.00 pay for one month (suspended for 60 days).

6. The applicant was arrested and confined by civil authorities and received 2-4 years' probation for the said charge of "sale of narcotic drug". It states a "206 action" has been initiated to discharge the applicant from service.

7. The applicant was notified on 5 December 1974 of his immediate commander's intent to initiate separation action against him under the provisions of Army Regulation 635-206 (Personnel Separations – Discharge – Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), by reason of civil conviction. Specifically, his conviction for possession of narcotic by civil court on 4 October 1974.

8. The applicant acknowledged receipt of the proposed separation notification. He waived consideration of his case by a board of officers and representation by counsel.

a. He further acknowledged understanding that he may be deprived of many rights and benefits as a Veteran under both Federal and State law, and he may encounter substantial prejudice in civilian life if he were issued a general discharge.

b. He elected to submit a statement in his own behalf stating he wished to be released from the military under any condition that would allow him to return to civilian life with the least amount of problems as for jobs and positions in society. While in the military he encountered tremendous pressure from Civil Authority. Yet as a civilian he hoped to restore his previous positions as a member of the California Correctional Department. If a creditable discharge was granted he would be exclusively grateful to the responsible chains and approving authority.

9. The applicant's immediate and intermediate commander formally recommended his separation from service, under the provisions of Army Regulation 635-206, by reason of misconduct. The intermediate commanders concurred with the recommended action and further recommended the issuance of an Undesirable Discharge Certificate.

10. The separation authority approved the recommended discharge on 19 July 1975, and further directed a general discharge certificate would be furnished.

11. The applicant was discharged on 23 January 1975, under the provisions of Army Regulation 635-206. His DD Form 214 confirms his service was characterized as under honorable conditions (general), with separation program designator "JKB" and reenlistment code "RE-3". He was credited with 1 year, 9 months, and 4 days of net active service with 35 days lost from 26 February 1974 to 1 April 1974.

12. There is no indication the applicant applied to the Army Discharge Review Board (ADRB) for review of his discharge within that Board's 15-year Statute of Limitations.

13. Regulatory guidance, in effect at the time, provided for the elimination of enlisted personnel for misconduct by reason of conviction by civil court. An under other than honorable conditions (UOTHC) discharge was normally considered appropriate.

14. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition and available military records, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination.

2. Furthermore, the Board found the applicant was discharged for misconduct and was provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. Therefore, they denied relief.

3 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.

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.

2/22/2024

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CHAIRPERSON

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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 Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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.

3. AR 635-206, in effect at the time, provided the authority for the administrative separation or retention of enlisted personnel who had committed an act and or acts of misconduct. Section VI of that regulation prescribed the standards and procedures for processing cases of individuals who, during their current term of active military service, had been convicted by a civil court. An undesirable (under other than honorable conditions) discharge was normally considered appropriate for members separating under this provision of the regulation; however, the separation authority could issue an honorable or a general discharge if warranted by the member's overall record of service.

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//