

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230007537

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

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

- DD Form 149 (Application for Correction of Military Record)
- Legal brief on behalf of the applicant
- In-service personnel and medical records
- Testimonial letters in support of clemency
- Civilian court documents
- Character reference letter
- Employment work and civilian education documents
- Memorandum from Under Secretary of Defense; subject: Guidance to Military Discharge Review Boards (DRBs) and BCMR/NRs Regarding Equity, Injustice, or Clemency Determinations, dated 25 July 2018
- Self-authored statement

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. Counsel states, in pertinent part:

a. The applicant is a 68 year-old Army Veteran who suffered injustice from his discharge characterization, and it should be upgraded to Honorable. He served over a decade in the Army; his superiors repeatedly complimented his work ethic and performance.

b. After his discharge in 1988, the applicant was convicted of murder and attempted murder and has been incarcerated since that time. While incarcerated, he has been a model inmate. He has worked prison jobs in the optical lab, as a law clerk, and doing

lawn care, data entry, tutoring, laundry, and warehouse work. He has volunteered for many years assisting fellow inmates with their legal matters. He took college courses and completed courses on accounting, sociology, religion, and humanities.

c. On certain occasions, the applicant did not perform up to his usual standards. In the ten and a half years he was in the Army, he was disciplined for being late to a mandatory meeting, wrongfully appropriating a meal worth fifty cents, and failing to obey an order. In addition, he received an UOTHC discharge for stealing a video recorder from a military wall locker and possessing a bayonet valued at \$8.86. He was charged with larceny, receiving stolen property, and wrongful disposition of government property and submitted a request for discharge for the good of the service.

d. The Board should waive the three year statute of limitations in the interest of justice, and the applicant's discharge characterization should be upgraded to Honorable. He is already entitled to a military pension based on his years of honorable service, should he be released from prison. His current request for discharge upgrade is a matter of pride and not an attempt to gain monetary benefit.

3. The applicant states he accepts responsibility for stealing the video recorder and keeping a stolen bayonet in his home. He is sorry for these offenses and deeply regrets his actions. He notices through all his difficulties and misfortunes that he perseveres.

4. The applicant enlisted in the Regular Army on 26 May 1972, for 2 years. He was honorably discharged on 9 May 1974, for immediate reenlistment. He was issued a DD Form 214 (Report of Separation from Active Duty) for this period of service. He was credited with 1 year, 11 months, and 14 days of net active service this period.

5. The applicant reenlisted in the Regular Army on 10 May 1974, in pay grade E-4.

6. On 25 March 1976, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go at the time prescribed to his appointed place of duty on or about 25 March 1976. His punishment included forfeiture of \$50.00 pay for one month.

7. On 14 May 1976, the applicant accepted NJP under Article 15 of the UCMJ, for wrongful appropriation of a meal, of a value of \$0.50 cents, on or about 10 May 1976. His punishment included forfeiture of \$100.00 pay for one month.

8. On 14 September 1976, the applicant accepted NJP under Article 15 of the UCMJ, for knowingly and wrongfully possessing marijuana, on or about 10 September 1976. His punishment included reduction in grade to E-3, forfeiture of \$100.00 pay for one month, and 30 days restriction and extra duty.

9. The applicant again reenlisted on 22 April 1980, in the pay grade E-5.
10. On 18 February 1982, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order, on or about 1 February 1982. His punishment included forfeiture of \$100.00 pay and 14 days extra duty.
11. A Criminal Investigation Division Report of Investigation, dated 7 December 1982, states the applicant stole a video recorder, property of the U.S. government, valued at \$580.00 from a secured wall locker; and found to be in possession of an Army bayonet, valued at \$8.86.
12. On 28 December 1982, 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 were 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 declined to submit a statement in his own behalf.
13. The applicant's commander recommended approval of the applicant's request for discharge, and further recommended the issuance of an UOTHC discharge. As the specific reasons, his commander noted that the applicant's conduct in itself warranted severe punishment.
14. On 5 January 1983, the applicant underwent a medical examination. He was deemed medically qualified for administrative separation.
15. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 6 January 1983, and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate).

16. The applicant was discharged on 13 January 1983. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service - in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Codes 3, and 3C. He completed 8 years, 8 months, and 4 days of net active service this period.

17. Additionally, his DD Form 214 shows he was awarded or authorized the Expert M-16 Badge, Good Conduct Medal (3rd Award), National Defense Service Medal, Army Service Ribbon, Noncommissioned Officer Professional Development Ribbon with Numeral 1.

18. The applicant's DD Form 214 does not show his continuous honorable active service period information that is required for members who honorably served their first term of enlistment [see Administrative Notes].

19. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 19 October 1986, the Board voted to deny relief and determined his discharge was both proper and equitable.

20. The applicant provides the following (provided in entirety for the Board):

a. A self-authored letter that details his military experiences and noteworthy accolades, his personal life following separation from the Army, his incarceration, and his educational accomplishments.

b. Character reference letters (7) that collectively attest to the applicant's work ethic, moral character, positive relationships with others, support he readily provides others, and evidence of his rehabilitation.

21. 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.

22. 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 Board reviewed the applicant's request to upgrade his character of service to honorable, his supporting documents, his statement and the statements he provides, the evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests.
2. After carefully considering the applicant's request and all the available evidence, argument, the Board determined relief was not warranted.
3. Discharges under the provisions of Army Regulation 635-200, chapter 10, are voluntary requests for discharge in lieu of trial by court-martial. The evidence shows that having been advised by legal counsel he voluntarily requested discharge for the good of the service in lieu of trial by court-martial. All requirements of law and regulation were met, and his rights were fully protected throughout the separation process. Further, his discharge accurately reflects his overall record of service.

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 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. The Board concurs with making the administrative notes annotated by the Analyst of Record (below the signature).

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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.

ADMINISTRATIVE NOTE(S): administratively correct block 18 (Remarks) of the applicant's DD Form 214 to add the below entries:

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE SERVICE FROM 740510 UNTIL 800421

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. Army Regulation 635-8 (Separation Processing and Documents) provides: for 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). Then, enter the specific periods of reenlistment as prescribed above.
4. 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.

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/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 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//