



offenses of: Negligent Homicide and Traffic Accident Following Too Closely [Traffic accident killed a German cyclist].

d. Although a DD Form 458 (Charge Sheet) is not available, other evidence shows court-martial charges were preferred against the applicant for violating the Uniform Code of Military Justice.

e. On 1 September 1992, the applicant consulted with legal counsel. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice (UCMJ), the possible effects of an under other than honorable conditions discharge, and the procedures and rights that were available to him. After receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, in lieu of court-martial. [Note: He initially submitted a conditional chapter 10, requesting a general discharge; however, his conditional request was denied. He then withdrew his conditional request and still requested a chapter 10 discharge.] In his request for discharge, the applicant stated/acknowledged/understood:

(1) He stated he was making this request of his own free will and had not been subjected to any coercion whatsoever by any person. He has been advised of the implications that are attached to it.

(2) He acknowledged that by submitting this request for discharge, he understood the elements of the offenses charged and that he was guilty of the charges against him or of a lesser offense which also authorizes the imposition of a bad conduct or dishonorable discharge.

(3) He stated that under no circumstances does he desire further rehabilitation, for he has no desire to perform further military service.

(4) He acknowledged he understood that if his discharge request was 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.

(5) He elected to submit a statement in his own behalf in which he stated he was deeply sorry for the tragic death of a male civilian. Since the accident he has been under a tremendous amount of stress and emotional strain. His duty performance for 10 years has been excellent, he learned a great deal from the tragic accident, and it is with great regret he makes this request for a conditional chapter 10 discharge in lieu of court-martial. With his statement, he also included multiple character reference letters and letters of support.

f. The applicant's immediate commander recommended approval and issuance of a general discharge due to the applicant's years of service and outstanding performance. His behavior does warrant discharge.

g. The applicant's intermediate commander recommended approval with issuance of an under other than honorable conditions discharge. He stated the applicant's misconduct is demeaning to the good order and discipline of the command. The applicant deserves to receive an under rother than honorable conditions discharge.

h. The applicant's senior commander recommended approval and stated he believed it was in the best interests of the Army to eliminate this Soldier now. Further retention of this individual would not be in the best interest of the Army.

i. On 8 September 1992, the separation authority approved the applicant's request for discharge, under the provisions of AR 635-200, Chapter 10, in lieu of court-martial, and directed his reduction to the lowest enlisted grade, if applicable, and the issuance of a under other than honorable conditions discharge.

j. The applicant was discharged on 19 January 1982. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged in the lowest enlisted grade under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial (Separation Code KFS, Reentry Code 3) and his service was characterized as under other than honorable conditions. His DD Form 214 shows he completed 10 years, 10 months, and 2 days of active service. Additionally:

(1) He was awarded or authorized, in addition to service awards, Army Achievement Medal (3rd Award) and Good Conduct Medal (2nd Award)

(2) Block 18 (Remarks) listed his reenlistments but not his continuous honorable service

4. On 1 February 2011, the Board considered his request to change his Reentry (RE) Code and denied it. The Board determined the applicant has not submitted any evidence that would warrant a change to his RE code. His RE code was administratively correct and in conformance with applicable regulations at the time of his separation. Therefore, there is no basis for granting the applicant's request to change his RE code.

5. On 7 December 2022, the Board considered his request for an upgrade of his discharge and denied it.

a. Prior to adjudicating his case, a medical officer/Behavioral Health Advisor reviewed the applicant's case and determined that based on the available information, although the applicant has a service-connected diagnosis of PTSD (post-traumatic

stress disorder), the diagnosis does not mitigate his misconduct. While the specifics surrounding the court-martial charges are not available for the Board to review, the evidence in the records suggest the applicant was likely facing charges of negligence associated with the accident whereby he struck and killed a cyclist, and sexual harassment. As the PTSD developed secondary to the accident, it is not a mitigating factor of the misconduct that resulted in the accident. Additionally, sexual harassment is not sequela of PTSD and therefore not a mitigating factor regardless of when it occurred.

b. 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, available military records and medical review, the Board concurred with the medical opinion finding the applicant has a service-connected diagnosis of PTSD, the diagnosis does not mitigate his misconduct. As the PTSD developed secondary to the accident, it would not mitigate the misconduct that resulted in the accident. Additionally, sexually harassment is not sequela of PTSD and therefore not a mitigating factor regardless of when it occurred.

(1) The Board noted the applicant 10 years of exemplary service and found his character letters of support compelling, however, 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. Based on this, the Board denied relief.

(2) Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to depict the military service of the applicant more accurately. Administrative Notes: A review of the applicant's records shows his DD Form 214 omitted administrative entries in the Remarks block. As a result, amend the DD Form 214 by adding in item 18 the entries:

- Member has completed first term of service
- Continuous honorable service from 19 January 1982 to 5 September 1990

6. On 21 March 2023, the applicant was issued a DD Form 215 (Correction to DD Form 214) that added to his DD Form 214, the entries: "Member has completed first term of service" and "Continuous honorable service from 19 January 1982 to 5 September 1990."

7. By regulation (AR 635-200), Chapter 10, a member who has committed an offense or offenses 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.

8. 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.

9. By regulation (AR 635-5-1), Separation Code KFS is the correct Separation Code assigned to Soldiers being separated under chapter 10 of AR 635-200 by reason of In Lieu of Trial by Court-Martial.

BOARD DISCUSSION:

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. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board again 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 evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Numbers AR20100019192 on 1 February 2011 and AR20220005553 on 7 December 2022.

5/6/2024

X

CHAIRPERSON

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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 10 provides that a member who has committed an offense or offenses 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. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

a. Paragraph 3-7a states that 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. Paragraph 3-7b states that 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.

2. 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. 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. 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//