

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 March 2024

DOCKET NUMBER: AR20230008672

APPLICANT REQUESTS: through counsel,

- an upgrade of his characterization of service from under other than honorable conditions (UOTHC) to honorable
- his Separation Program Designator (SPD) code and narrative reason for separation be amended to reflect "Secretarial Authority"
- the Reentry Eligibility (RE) code be changed from "RE-4" to "RE-1"

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel petition and 5 Exhibits (15 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, through counsel, he respectfully submits this application to correct his records regarding upgrading his discharge status from UOTHC to "Honorable." Further, the applicant is seeking a change in the narrative reason for his separation from "In Lieu of Trial by Court Martial" to "Secretarial Authority" with corresponding SPD code, and a RE code change from "RE-4" to "RE-1." Relief is requested under a theory of material error. Counsel's entire brief, including all referenced exhibits, is available in its entirety for the Board's consideration.

a. Counsel notes the applicant participated in various military education programs, received numerous awards and decorations, and served honorably for many years as he ascended the enlisted ranks to the rank/pay grade of staff sergeant (SSG)/E-6.

b. The applicant's company commander sent a letter, dated 5 February 1999, wherein he stated the applicant was a candidate for reenlistment at the time. He stated

the applicant had consistently displayed the loyalty, sense of duty and selfless service, integrity, and personal courage which were both desired and needed in the Army. He encouraged the applicant's father to ensure the applicant considered all available options and benefits when deciding whether he should reenlist.

c. Following this, the applicant experienced hardship in his relationship with his then-wife. The breakdown in their relationship affected the applicant's service in the Army when the applicant's ex-wife would call his command incessantly. Her constant communication led to a decline in the applicant's relationship with his chain of command.

d. On or about 7 February 2001, the applicant was charged with violating Article 86 of the Uniform Code of Military Justice (UCMJ) by being absent without leave (AWOL) from 25 July 2000 until 6 February 2001. He was separated on 19 November 2001.

e. It is respectfully submitted that the applicant suffered a material error as a result of his erroneous discharge from the Army. A discretionary error was made when the applicant's many years of honorable service and circumstances out of his control were disregarded because of a single mistake, and he was discharged.

f. Counsel provides the following documents in support of the brief.

(1) Exhibit 1 – A DD Form 214 (Certificate of Release or Discharge from Active Duty) which provides a synopsis of the applicant's service, military education, and authorized awards and decorations.

(2) Exhibit 2 – An affidavit rendered by the applicant on 8 February 2001 which depicts some basic information about his identity and military service.

(3) Exhibit 3 – The aforementioned reenlistment letter to the applicant's father; his high school diploma; two U.S. Marine Corps Federal Length of Service Awards (10 years and 25 years); and a Marine Depot Maintenance Command Production Plant Barstow Performance Recognition Program certificate.

(4) Exhibit 4 – A DD Form 458 (Charge Sheet) which shows court-martial charges were preferred against the applicant on 8 February 2001 for violating Article 86, UCMJ by being AWOL from on or about 25 July 2000 until on or about 6 February 2001.

(5) Exhibit 5 – A Naval Civil Engineer Corps Officers School, Port Hueneme, CA Certificate of Graduation which shows the applicant successfully completed the Introduction to Hazardous Waste Generation and Handling Course conducted from 29 November to 1 December 2005.

3. Following a period of honorable service in the Georgia Army National Guard, the applicant enlisted in the Regular Army for a period of 4 years on 21 October 1992 in the rank/pay grade of sergeant/E-5. He reenlisted on 1 March 1995, 7 January 1997, and 20 April 1999, respectively. He was promoted to SSG on 1 November 1999.

4. The applicant's unit reported the following changes in his duty status on:

- 25 July 2000 – from Present for Duty (PDY) to AWOL
- 24 August 2000 – from AWOL to Dropped from Rolls (DFR)
- 6 February 2001 – from DFR to PDY/Returned to Military Control after being apprehended by civilian authorities in Barstow, CA

5. A DD Form 458 shows court-martial charges were preferred against the applicant on 8 February 2001 for violating Article 86, of the UCMJ by being AWOL from on or about 25 July 2000 until on or about 6 February 2001

6. On 9 February 2001, 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. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him. He declined the opportunities to submit a statement in his own behalf and undergo a physical evaluation prior to his separation.

7. The applicant's immediate commander recommended approval of his request with a discharge UOTHC.

8. On 31 October 2001, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced to the lowest enlisted grade.

9. Orders and the applicant's DD Form 214 show he was discharged on 19 November 2001, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with SPD code "KFS" and RE code "4." He was credited with completing 9 years, 2 months, and 16 days of net active service this period. He had completed his first full term of service. He was awarded or authorized the:

- Army Commendation Medal (2nd award)
- Army Achievement Medal (5th award)
- Joint Meritorious Unit Award
- Army Service Ribbon

- Overseas Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle bar
- Expert Infantryman Badge

10. Evidence shows the applicant enlisted on 21 October 1992 and reenlisted on 1 March 1995, 7 January 1997, and 20 April 1999, respectively." There is no entry specifying the applicant's period of honorable service (see Administrative Notes).

11. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

12. 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 carefully considered the applicant and counsel's request for an upgrade of his characterization of service from under other than honorable conditions to honorable, his separation code and narrative reason for separation to reflect "Secretarial Authority," and his reentry code from 4 to 1. The Board also considered the applicant/counsel's petition and exhibits, evidence in the service record, the applicable Army Regulations, Statutory guidance, and the published Department of Defense guidance for consideration of discharge upgrade requests based upon clemency, and found relief was not warranted.

2. Counsel contends the applicant went AWOL because he was having marital problems, and argues the Board should consider the applicant's situation, his many years of previous honorable service, his post service education, and based on an application of clemency, upgrade the applicant's entire discharge, to include, the authority, narrative Reason, separation and reentry codes, to reflect an honorable characterization under secretarial authority.

a. However, the applicant was a SSG/E-6 with over 9 years of active service when he chose to depart AWOL. The record indicates he intended to remain AWOL, in that he was apprehended by civil authorities after being AWOL for over 6 months, vice surrendering himself to military authorities.

b. Further, he elected to receive a discharge in lieu of a trial by court-martial, after receiving advisement by counsel; he was fully aware the characterization of service he would receive, and the implications attached. The Board did not find any error nor injustice regarding the applicant's reason for nor the characterization of his service. He was properly and equitably discharged in accordance with the regulations in effect at the time.

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:

Other than the corrections addressed in Administrative Note(s) below, the Board determined 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

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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 NOTES: correct the applicant's DD Form 214, for the period ending 19 November 2001, in item 18 (Remarks), to add, "SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE" and "CONTINUOUS HONORABLE SERVICE FROM 19921021 to 19990419."

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.
3. Army Regulation 635-5 (Separation Documents), in effect at the time, prescribed the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It established the standardized policy for preparing and distributing the DD Form 214. It stated the DD Form 214 provides a brief, clear-cut record of active Army service at the time of release from active duty, retirement, or discharge.
 - a. Paragraph 1-4b(5) of the regulation in effect at the time stated that a DD Form 214 would not be prepared for enlisted Soldiers discharged for immediate reenlistment in the Regular Army.
 - b. Paragraph 2-4h(18) of the regulation currently in effect states that item 18 documents the remarks that are pertinent to the proper accounting of the separating Soldier's period of service. Subparagraph (c) states that for enlisted Soldiers with more than one enlistment period during the time covered by the DD Form 214, enter "IMMEDIATE REENLISTMENTS THIS PERIOD" and specify the appropriate dates. For Soldiers who have previously reenlisted without being issued a DD Form 214 and who are later separated with any characterization of service except "honorable," enter "CONTINUOUS HONORABLE ACTIVE SERVICE FROM" (first day of service which DD Form 214 was issued) UNTIL (date before commencement of current enlistment)." Then, enter the specific periods of reenlistments as prescribed above.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 5, paragraph 5-3 states separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of

the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

b. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

c. 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.

d. 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.

e. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

6. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Table 2-3 provides the SPDs and narrative reasons for separation that are applicable to enlisted personnel. It shows, in part, SPD KFS is the appropriate code to assign to an enlisted Soldier who is voluntarily separated under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. JFF is the appropriate SPD to assign to enlisted Soldiers who are voluntarily discharged under Secretarial authority. Additionally, the SPD/RE Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason.

7. 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. 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. 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//