

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 March 2024

DOCKET NUMBER: AR20230008758

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (DVA) Letter

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 he recently received a letter regarding favorable findings of his request for an upgrade in his discharge in 1979. He is requesting that he get his DD Form 214 (Report of Separation from Active Duty) corrected also. He has filed information in recent months to request a change in the character of his discharge.
3. The applicant enlisted in the Regular Army on 29 August 1977 for four years. His military occupational specialty was 11B (Infantryman).
4. The applicant served in Germany from 9 January 1978 through 30 October 1978.
5. The applicant was absent without leave (AWOL) on 31 October 1978. He failed to return from overseas leave.
6. The applicant surrendered to military authorities on 26 July 1979 and returned to military control.
7. A Report of Mental Status Evaluation, dated 2 August 1979, shows the applicant did not have significant mental illness, was mentally responsible, able to distinguish right

from wrong, able to adhere to the right, had the mental capacity to understand and participate in board proceedings and met retention standards.

8. Court-martial charges were preferred against the applicant on 3 August 1979 for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 31 October 1978 until on or about 26 July 1979.

9. The applicant consulted with legal counsel on 3 August 1979 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 under other than honorable discharge; and the procedures and rights that were available to him.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He further 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 and he may expect to encounter substantial prejudice in civilian life because of an UOTHC discharge.

b. He elected not to submit statements in his own behalf.

10. The applicant's commander recommended approval of his request for discharge in lieu of trial by court-martial on 21 August 1979. He stated the applicant had become disillusioned with the military. Further retention would not be in the best interest of the Army and recommended an UOTHC discharge.

11. The separation authority approved the applicant's request for discharge under the provisions of AR 635-200, Chapter 10, on 27 August 1979. He directed the applicant's reduction to the lowest enlisted grade with the issuance of an DD Form 794A (UOTHC Discharge Certificate).

12. The applicant was discharged on 3 September 1979. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for administrative discharge, conduct triable by court martial. He was assigned Separation Program Designator JFS with Reenlistment Code 3B. His service was characterized as UOTHC. He completed 1 year, 3 months, and 10 days of net active service. He had 268 days of lost time.

13. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for

discharge in lieu of trial by court-martial. An UOTHC characterization of service is normally considered appropriate.

14. The applicant provides a DVA letter, dated 10 May 2023, that shows his service for the period 29 August 1977 through 3 September 1979 is considered honorable for VA purposes. His reason for AWOL included a family hardship suffered during overseas service.

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

#### 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. The Board noted a VA determination has no bearing on this Board as the VA operates under different provisions of law when making its determinations. Based on a preponderance of the evidence, the Board 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>	
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:	:	:	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.

7/15/2024

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. 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. AR 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 UOTH discharge was normally considered appropriate.

3. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards and Service Boards for Correction of Military/Naval Records (BCM/NR) on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//