

IN THE CASE OF: ██████████

BOARD DATE: 29 February 2024

DOCKET NUMBER: AR20230008929

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to honorable.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record)

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 volunteered and served honorably, but received a court martial that was unjust. He was accused of assaulting the motor Sergeant in the field, but all he did was throw his shovel into the back of his jeep. There was never any contact or even any attempted contact. He was given 30 days although he only had a couple of months left, he was sent to retraining near his completion. He was in line at the mess hall, when he observed a large person in front of him, and he started picking on a small person in front of him. He told that person to leave the other person alone, and that is when the person started shoving him. This was witnessed by a Sergeant. He was taken into to an office and was told that this was not his first incident and that he needed to sign a paper releasing him for the Army. He knows this happened a longtime ago, but it has always bothered him. He is not looking for any benefits, he just would like for his record to show that he served honorably.
3. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 6 June 1978.
 - b. His DA Form 2-1 item 35 (Section VII – Current and Previous Assignments) shows that he was confined on 26 November 1980.

c. The applicant's record is void of documentation relating to his under other than honorable conditions discharge.

d. On 19 February 1981, the applicant was discharged under the provisions of AR 635-200, Paragraph 14-33b(1), with his service characterized as under other than honorable conditions. He completed 2 years, 7 months and 21 days of net service this period. His DD Form 214 also shows in :

- item 25 (Separation Authority): Paragraph 14-33b(1), AR 635-200
- item 28 (Narrative Reason for Separation): Misconduct – Frequent incidents of a discreditable nature with civil or military authorities
- item 29 (Dates of Time Lost During this Period): 26 November 1980 to 18 December 1980

4. By regulation, action will be taken to separate a member for misconduct when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier, further effort is unlikely to succeed; or rehabilitation is impracticable, or he is not amenable to rehabilitation measures.

5. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the limited information related to the misconduct leading to the applicant's separation and the misconduct described within the applicant's given statement involving violent behavior towards other service members, as well as a lack of any mitigation for the misconduct described, the Board concluded there was insufficient evidence of an error or injustice warranting a correction to the applicant's record.

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.

5/20/2024

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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribes the basic authority for the separation of enlisted personnel.
 - a. Paragraph 1-13a (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an Honorable Discharge Certificate is predicated upon proper military behavior and proficient performance of duty during the member's

current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.

b. Paragraph 1-13b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 14-33 (Other Misconduct) states action will be taken to separate a member for misconduct when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier, further effort is unlikely to succeed; or rehabilitation is impracticable, or he is not amenable to rehabilitation measures.

3. 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 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.

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.

4. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) 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.

//NOTHING FOLLOWS//