

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 March 2024

DOCKET NUMBER: AR20230008964

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions characterization of service. He also requests a personal appearance.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Statement
- Previous Record of proceedings
- Parts of a Chapter 10 Packet
- Certificate of Achievement
- Certificate for award of the Army Achievement Medal
- Certificates of promotion to E-3 and to E-4
- 1998 Individual Income Tax Form
- DD Form 214 (certificate of Release or Discharge from Active Duty), 22 June 2000
- Driver License

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210006076, on 27 October 2021

2. The applicant states an Other Than Honorable Discharge does not reflect his impeccable service record. The reasons for being given this discharge are: (1) use of force or violence to produce serious bodily harm or death, (2) abuse of trust, (3) disregard for customary superior/subordinate relationships, (4) lengthy AWOL (absent without leave) time, and (5) acts that endanger the security of the United States or welfare of other Army member(s). None of these describe his service record as he had never been disciplined or reprimanded in his time in active duty and to the contrary was promptly promoted through the ranks and awarded the Army Achievement Medal for professionalism and dedication to the mission always supporting his peers and superiors throughout. An Other Than Honorable Discharge has negatively affected his

life as a civilian with regard to international travel and personal morale. The delay in response is due to the need to move on with life after being discharged to focus on educational and career opportunities. Prior to this situation and ever since, he has never been arrested or had any issues with the law. This black mark on his past is not reflective of the person he is or was at the time as his record states. He also states in a personal letter:

a. To address the reasons for taking the Other than Honorable Discharge, as mentioned in the overview of the case (attached) there was an investigation conducted on several individuals at the Illesheim Barracks at that time including Specialist (SPC) ■■■, SPC ■■■, and Private ■■■. SPC ■■■ ended up being convicted of drug possession and distribution and was convicted in court and sentenced to several years in Manheim/military prison. Several others, including himself, were named in this investigation with only the one, SPC ■■■, being convicted. The others took plea deals to testify against him and he (the applicant) believes that's what they wanted him to do as well, but he refused to cooperate at the time because he was very intimidated and didn't know what else to do. Hindsight, he should have just told them anything he knew about the soldier they eventually prosecuted.

b. He never failed a drug test, was not found in possession of nor distributed drugs to anyone, but he did refuse to cooperate in the investigation and by refusing to cooperate with the investigators, he believes they thought he was involved. He was assigned a defense council Captain (CPT) ■■■ that seemed anxious to settle the case and suggested he goes to a chapter 10 route and take the Other Than Honorable Discharge that was offered. As mentioned, he was young (20 years old at the time), pressured, and panicked by the charges and the potential worst-case scenario and the urgency from his council to settle the case. That stated and based on his service up to that point with not one reprimand or write up during my time in active duty by any superiors as well as being awarded the Army Achievement Medal, he feels that an Other Than Honorable Discharge does not reflect his impeccable record and proud service to this country and a rushed decision at a youthful age should not last the entirety of my life.

3. Review of the applicant's available service records shows:

a. The applicant enlisted in the Regular Army on 6 January 1998. He completed training and was awarded military occupational specialty 55B (Ammunition Specialist).

b. He was promoted to private first class/E-3 on 1 August 1998 and to /E-4 on 1 August 1999.

c. He served in Germany with the 2nd Squadron, 6th Cavalry. During his Germany service, he deployed to Albania/Kosovo from on or about 14 April 1999 to on or about 23 July 1999.

d. The complete separation packet (specifically the DD Form 458 (Charge Sheet) and his request for discharge in lieu of trial by court-martial) is not available for review

e. His service record contains an Order to Plead Guilty, dated 18 May 2000 that reads he, the accused in a court-martial now pending, has examined the charges preferred against him, and all of the supporting evidence thus far provided by the Government. After consulting with his defense counsel, CPT [REDACTED] and being fully advised that he has a legal and moral right to plead not guilty and to place the burden of proving my guilt beyond a reasonable doubt upon the prosecution. He offers:

(1) To plead to the Charge and its Specifications: Guilty

(2) To enter into a written stipulation of fact with the trial counsel as to the circumstances of the offenses. This stipulation may be used pursuant to this agreement to determine the providence of my plea and to inform the military judge of matters pertinent to an appropriate sentence. If his plea is not accepted this offer to stipulate and the stipulation are null and void.

(3) To waive his right to a panel and proceed to trial by summary court-martial officer and not request personal appearance of overseas witnesses. If requested to cooperate in the subsequent investigations and trials against the following individuals: SPC [REDACTED], SPC [REDACTED], PV2 [REDACTED], and other individuals known to him within the Illisheim community. Cooperation is defined as providing truthful information to investigators, prosecutors, and defense counsel, and testifying truthfully at trial. This agreement to cooperate is conditioned upon him receiving testimonial immunity pursuant to [REDACTED] 704(a)(1) for misconduct stemming from or relating to the charges listed above in paragraph l(a).

(4) In exchange for his actions as stated above, the convening authority agrees to take the actions specified in Appendix I to this offer. He is satisfied with [REDACTED] [REDACTED] the defense counsel who has been detailed to defend him. [REDACTED] has advised him of the meaning and effect of his guilty plea, and he understands the meaning and effect thereof. No person or persons have made any attempt to force or coerce him into making this offer to plead guilty. There are no other promises, conditions or understandings regarding his proposed plea of guilty that are not contained in this offer and the enclosure.

f. His record contains a memorandum signed by the separation authority (Commanding General 1st Infantry Division), that reads:

(1) The request for discharge in lieu of trial by court-martial submitted by [Applicant] is approved. The charges and specifications are dismissed without prejudice.

(2) Soldier will be reduced to the grade of Private E-1. Soldier will be issued an Under Other Than Honorable Conditions Discharge Certificate. Soldier will not be transferred to the Individual Ready Reserve.

g. The applicant was discharged from active duty on 22 June 2000. His DD Form 214 and Orders 167-001, 15 June 2000, show he was discharged from active duty on 22 June 2000, under the provisions of Army Regulation (AR) 635- 200 (Personnel Separations - Enlisted Personnel), chapter 10 (In Lieu of Trial by Court-Martial) with an under other than honorable conditions characterization of service. He completed 2 years, 5 months, and 17 days of net active service during this period and was awarded or authorized the:

- Army Achievement Medal
- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge (M-16 Rifle)

4. On 27 October 2021, in response to the applicant's request for an upgrade of his discharge, and after reviewing the application and all supporting documents, the Board found the relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service and the reason for his separation. The Board determined there was insufficient evidence in the applicant's record to access the misconduct. The applicant provided post service achievements. The Board members agreed that the burden of proof lies with the applicant; however, he did not provide any supporting documentation regarding the reason of his discharge. Therefore, the Board determined the overall merits of this case are insufficient as a basis to grant relief for an upgrade to his discharge.

5. By regulation (AR 636-200) 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. An under other than honorable conditions is authorized and normally considered appropriate.

6. In reaching its determination, the Board can consider the applicant's petition, his service record, and his statements in light of the published Department of Defense guidance on equity, injustice, or clemency.

BOARD DISCUSSION:

1. 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 and available military record, the Board noted, the applicant provided insufficient evidence of post-service achievements or character letters of support that would attest to his honorable conduct that might have mitigated the discharge characterization.

2. The Board found the applicant accepted a chapter 10, a voluntary discharge request in-lieu of trial by court martial. Under liberal consideration, the Board found insufficient evidence of in-service mitigating factors for the misconduct to weigh a clemency determination. Furthermore, the Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board agreed reversal of the previous Board determination is without merit and denied relief.

3. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20210006076, on 27 October 2021.

3/19/2024



 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 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 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.

3. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//