

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230009788

APPLICANT REQUESTS:

- upgrade of his discharge under other than honorable conditions
- personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) 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:

a. He is requesting upgrade of his discharge to honorable or under honorable conditions. He was a good Soldier. He would volunteer often and had a good rapport with all of his supervisors except their second lieutenant (2LT). No matter what he did, he got negative feedback from him, and he let it get the best of him. He would report it, and nothing would be done, so he started butting heads with him. He continued to have a good rapport with the rest of his superiors though.

b. He feels since Basic Combat Training (BCT), he had enjoyed his service and always did his best. He was proud to be in the Army from BCT even until now. He is disappointed in himself for letting another person's actions make him change his character. He loved the field training exercise, mountain and snow training and is still proud to say he was in the Army, but very embarrassed by his discharge.

c. At the time, he did not know he could fight to have his discharge upgraded. He was only 21 and had no experience. Being in the Army gave him good structure and a

good character that he still carries today. He is hoping that the honorable parts of his record outshine the end part of his service before his discharge.

3. The applicant enlisted in the Regular Army on 22 June 1978.

4. A Company A, 4th Engineer Battalion Letter of Reprimand, dated 12 January 1979, shows the applicant was arrested for shoplifting at the Main Post Exchange on 3 December 1978. Shoplifting is a serious offense and brings discredit upon himself and his unit and goes against all good order and discipline of the Army. Any further such serious offenses will be dealt with appropriately.

5. DA Form 2627 (Record of Proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ)) shows:

a. The applicant's company commander informed him on 4 August 1980, he was considering punishing him under Article 15 of the UCMJ for behaving with disrespect toward 2LT S\_\_\_\_, his superior commissioned officer, by saying to him, "you bastard."

b. On 7 August 1980, the applicant requested an open hearing, which was granted. All matters presented in defense were considered and the imposed punishment was reduction in rank/grade to private (PV2)/E-2, forfeiture of \$100.00, suspended until 12 November 1980, and 14 days restriction to the company area.

c. On 12 August 1980, he appealed the matter for consideration by the next superior officer, and his appeal was denied.

5. A DA Form 4187 (Personnel Action), dated 19 August 1980, shows:

a. The applicant's duty status was changed from present for duty (PDY) to confined by civilian authorities (CCA) on 18 August 1980.

b. The applicant was in the hands of civil authorities and confined in jail due to theft in El Paso, TX, on 18 August 1980.

c. His duty status was changed from CCA to PDY on 20 August 1980.

6. A DA Form 4126-R (Bar to Reenlistment Certificate), dated 9 September 1980, shows it was recommended the applicant be barred from reenlistment for the following misconduct:

- field grade nonjudicial punishment (NJP) pending for absent without leave (AWOL)

- field grade NJP pending for stealing out of the motor pool
- insufficient funds of \$60.00, 19 June 1979
- arrested for shoplifting at the Main Post Exchange, 3 December 1978
- shoplifting, 13 December 1978
- aggravated theft of motor vehicle, 2 February 1979
- shoplifting, 7 February 1979
- speeding 93 miles per hour (MPH), 6 March 1979
- involved in accident and did not have liability insurance, 11 May 1979
- late for formation, 21 November 1979
- failure to pay for loan, 21 February 1980
- disrespect to a noncommissioned officer (NCO) and officer, 6 June 1980
- absent from duty, 19 June 1980
- military appearance below standards, 20 June 1980
- missed duty all day, 17 July 1980
- failure to pay J.C. Penny bill, 25 July 1980
- company grade NJP received for disrespect to an officer, 4 August 1980
- arrested for burglary, 8 August 1980

7. On 10 September 1980, the applicant was barred from reenlistment and ineligible for promotion consideration.

8. A second DA Form 2627 shows:

a. The applicant's battalion commander informed him on 27 August 1980, he was considering punishing him under Article 15 of the UCMJ for attempting to steal one gallon of anti-freeze, the property of the U.S. Government, on 5 August 1980.

b. On 15 September 1980, the applicant presented matters in his defense and/or extenuation. All matters presented in defense were considered and the imposed punishment was forfeiture of \$00.00 per month for 2 months and correctional custody for 30 days, effective upon entry.

c. On 15 September 1980, he appealed the matter for consideration by the next superior officer. On 16 October 1980, the Assistant Staff Judge Advocate considered the appeal and determined the proceedings were conducted in accordance with law and regulation and the imposed punishment was not disproportionate to the offense charged and his appeal was denied.

9. A DA Form 3822-R (Mental Status Evaluation), dated 18 November 1980, shows the applicant underwent mental status evaluation on the date of the form for the purpose of

consideration for discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, due to misconduct. He was found to be mentally responsible, meet the retention requirements of Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, have no psychiatric disorder and was cleared for any administrative action deemed appropriate by the command,

10. The applicant's discharge packet, to include his notification of separation initiation, acknowledgement, and rights election, is not in his available service records for review.

11. Headquarters, Fort Carson and Headquarters, 4th Infantry Division (Mechanized) Order 254-653, dated 19 December 1980, reduced the applicant in rank and grade from PV2/E-2 to PV1/E-1 effective 18 December 1980.

12. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under other than honorable conditions on 20 January 1981, in the rank/grade of PVT/E-1, under the provisions of Army Regulation 635-200, chapter 14, due to frequent incidents of a discreditable nature with civil or military authorities, with corresponding separation code JKA and a reentry code of 4. He was credited with 2 years, 6 months, and 26 days of net active service, with lost time from 18 August 1980 through 20 August 1980.

13. There is no indication the applicant applied to Army Discharge Review Board to request an upgrade of his discharge within that Board's 15-year statute of limitations.

14. The applicant provided an argument or evidence the Board should consider in accordance with the published Department of Defense guidance regarding liberal consideration, equity, injustice, or clemency determinations.

#### BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant 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.

3. The applicant did not provide nor do his records contain any documentation that could be considered as a mitigating factor for his behavior or evidence sufficient enough

to justify the Boards application of clemency. The applicant's record contains a long history of indiscipline which does not rise to a level meriting an under honorable conditions (general) or honorable characterization of service.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	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.

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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.

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 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, use of illegal drugs, and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate for a Soldier discharged under this chapter.

b. Chapter 3 (Character of Service and Description of Separation) provides:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct.

(2) 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.

(3) A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court-martial when the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army or when the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- use of force or violence to produce serious bodily injury or death
- abuse of a special position of trust
- disregard by a superior of customary superior-subordinate relationships
- acts or omissions that endanger the security of the United States or the health and welfare of other Servicemembers

- deliberate acts or omissions that seriously endanger the health and safety of other persons

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 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.

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. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

b. 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.

//NOTHING FOLLOWS//