

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010051

APPLICANT REQUESTS: reconsideration of his previous request for restoration of his involuntary retirement and an appearance before the Board via video or telephone. Alternatively, he requests the issuance of a DD Form 214 (Certificate of Release or Discharge from Active Duty) showing a retroactive Conscientious Objector Discharge, effective 31 November 2015.

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

- DD Form 149 (Application for Correction of Military Record)
- Exhibit A, Memorandum, Reconsideration of ABCMR Case AR20210011934, dated 20 June 2023, and a Table of Contents for all appendices
- Exhibit B, Appendices 1 through 100, excerpts from AR 27-10 (Military Justice) and AR 25-50 (Preparing and Managing Correspondence), and U.S. v. Nettles, 74 M.J. 289 (C.A.A.C. 2015)
- Exhibit C, Memorandum, Application for Retroactive Conscientious Objector Discharge, dated 20 June 2023
- Supplement 1, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 29 June 2023, and associated documents to include articles and information regarding the history of the "Molokan Russians"
- Supplement 2, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 25 August 2023, and associated documents (Appendices 1 through 14) which were considered in ABCMR Docket Number AR20230005030 on 20 December 2023
- Supplement 3, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 10 January 2023, and associated documents (Enclosures 1 through 5)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AR20210011934 on 26 May 2022 and AR20230005030 on 20 December 2023.

2. The portion of the applicant's request included in Supplement 2, Request for Reconsideration ABCMR Case Number AR-20210011934-(Applicant's name); Entitlement to a DD Form 214 Reflecting an Involuntary Discharge pursuant to 10 U.S. Code (USC), Section 632(a)(3) and associated documents was considered in Docket Number AR20230005030 on 20 December 2023.

3. The applicant states, in effect:

a. He meets all of the criteria and is entitled to a DD Form 214 reflecting a discharge pursuant to Title 10, U.S. Code (USC), Section 632(a)(3). Alternatively, he requests a retroactive conscientious discharge due to his sincere belief in that of his forefathers; an ethno-religious group called the "Molokan-Russians" who believe participation in the military in any form is anathema to the religion.

b. The Molokan faith has a long history which started in Southern Russia hundreds of years ago. The doctrine of this faith is not publicly known. Aspects can be found in a private publication, "The Book of Life" which is typically restricted to members of the sect (See excerpt under Supplement 1 of supporting documents). Membership in the sect is restricted to heritage or genetics. You are born into it. His beliefs were acquired since childhood. At the age of 21, he began to question the beliefs of his forefathers and had absorbed a lot of typical American culture. He became somewhat ashamed that his male relatives were "conscientious objectors." He decided his service in the Army would be part of a "generating force" and not in any direct combat type of duties. However, with increasing responsibility as an officer, he witnessed many unwholesome decisions by senior leaders.

c. The re-crystallization of his faith occurred around the time his grandmother died, in the year 2015. At the same time, he and his family suffered from inexplicable persecution by military officials at Redstone Arsenal. There are no conditions which he believes the use of force or violence is acceptable. He has a deep and daily commitment to learning and increasing his understanding of biblical, historical, anthropological, psychological, scientific, and alchemical developments to advance the spirit, to share knowledge, commune with other learned individuals, and practice charity, which is completely incompatible with military service.

4. The applicant enlisted in the Regular Army on 5 January 1994 for a 4-year period. Upon the completion of initial entry training, he was awarded military occupational specialty 71D (Legal Specialist).

5. On 20 August 1996, the applicant enlisted in the U.S. Army Reserve (USAR), for an 8-year period, as a cadet in the Reserve Officers' Training Corps (ROTC). He was subsequently honorably discharged from the Regular Army on 21 August 1996, for the

purpose of entering the officer training program. His DD Form 214 shows he was credited with 2 years, 7 months, and 17 days of net active service.

6. Orders Number 113-7-A-439, issued by Headquarters, Fourth Region, U.S. Army Cadet Command (USACC), dated 23 April 1998, ordered the applicant to active duty, for the completion of the Officer Basic Course, with a 4-year service obligation upon completion of the course.

7. On 21 May 1998, the applicant executed his Oath of Office and was appointed as a Reserve Commissioned Officer of the U.S. Army in the rank of Second Lieutenant (2LT).

8. He was subsequently promoted to the rank of Captain on 6 November 2001 and Major on 19 November 2007.

9. Law Enforcement Report 00476-2015-MPC103-3B2/3C3 and associated documents, show that on 10 May 2015, the applicant was arrested and cited for driving under the influence (DUI) and for a traffic violation – other, at Redstone Arsenal, AL, after being stopped for speeding and failing a series of Standardized Field Sobriety Tests. His blood alcohol content (BAC) was .186 percent. He was temporarily detained until his BAC reached an acceptable level.

10. A memorandum from U.S. Army Garrison-Redstone, Redstone Arsenal, AL, dated 14 July 2015, shows the applicant was enrolled in the Army Substance Abuse Program (ASAP) outpatient program on 22 May 2015. He actively engaged in ASAP treatment and met all treatment requirements. He was successfully released from the program on 14 July 2015, with a prognosis of "good."

11. The U.S. Army Aviation and Missile Command (AMCOM), Commanding General (CG) issued the applicant a General Officer Memorandum of Reprimand (GOMOR), on 29 July 2015, for DUI and driving at an excessive speed.

a. The CG informed him the reprimand was an administrative action and not punishment under the Uniform Code of Military Justice (UCMJ). Any matters submitted in rebuttal would be considered prior to the CG making his final decision regarding the filing of the reprimand in the applicant's Official Military Personnel File (OMPF). The applicant acknowledged receipt of the GOMOR on 3 August 2015.

b. On 5 August 2015, the applicant submitted a rebuttal to the GOMOR, wherein he stated, on 10 May 2015, he received a frantic call from his former spouse, L.M., informing him that her friend was involved in a domestic violence incident. She asked if he could lend her some money to assist. Feeling compelled to help, he drove to the nearest ATM, approximately two miles from his residence. Upon return from the ATM,

less than one mile from his residence. He was pulled over by the Redstone Arsenal Security Police. He fully cooperated during the stop. However, it was apparent he was being accused of DUI. Being unsure of the legality of their inquiries and of his legal rights, he ceased answering questions. This was his first alcohol related incident in his lifetime and during his unblemished service to the Army. He went on to speak about his tremendous responsibilities as an officer and single parent, his participation in ASAP, and his proven value as an asset to the Army.

c. Subsequently, the CG recommended the GOMOR be placed permanently in the applicant's Army Military Human Resource Record (AMHRR).

12. On 13 August 2015, the applicant was notified by U.S. Army Human Resources Command (AHRC) that he was not selected for promotion to lieutenant colonel; therefore, he was required to be involuntarily retired no later than 31 January 2016, pursuant to USC, Title 10, Section 632(a)(2) and (3). However, he could request retirement under the provisions of Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges).

13. Orders Number 233-0003, issued by U.S. Army Installation Management Command, Headquarters, U. S. Army Garrison – Redstone, dated 21 August 2015, ordered the applicant to be reassigned for separation processing and mandatory retirement, effective 31 January 2016.

14. Law Enforcement Report 01014-2015-MPC103-5C2, shows the applicant was named as the subject and his former spouse, L.M., was named as the victim in an incident of domestic violence on 15 November 2015. The applicant was detained, transported to the police station, issued a violation notice for domestic assault in the third degree, and released to his unit.

15. On 8 December 2015, the Missile Defense Agency, CG, issued the applicant a GOMOR for assaulting his former spouse on 15 November 2015. The CG further stated, a police investigation revealed the applicant was currently married to J.A.H., but he and L.M. were cohabitating in Redstone Arsenal government quarters. He physically assaulted L.M. in the recent past. When responding to the domestic violence complaint, the police noticed a very strong odor of alcohol emanating from both [the applicant] and L.M., and [the applicant's] minor child was present during the assault. The applicant's commander presented the GOMOR to the applicant on 17 December 2015; however, the applicant refused to sign the acknowledgement and indicated he did not wish to submit a statement in his own behalf. Subsequently, the CG, elected to place the GOMOR permanently in the applicant's AMHRR.

16. Orders 029-001, issued by U.S. Army Installation Management Command, Headquarters, U. S. Army Garrison – Redstone, dated 29 January 2016, rescinded

Orders 233-0003, pertaining to the applicant's retirement, citing AR 600-8-24 as the authority.

17. Before a general court-martial, on 2 February 2018, contrary to the applicant's pleas, the applicant was found guilty of the following violations of the UCMJ:

- between on or about 1 May and 30 June 2007, the applicant raped L.M.
- between on or about 25 July and 31 August 2011, the applicant caused J.H. to engage in a sexual act and inflicted bodily harm by holding her down with his hands and the weight of his body
- between on or about 6 October and 11 October 2011, the applicant caused J.H. to engage in a sexual act and inflicted bodily harm by holding her down with his hands and the weight of his body
- on or about 24 December 2014, the applicant unlawfully struck C.L. twice in the face with his hand
- on diverse occasions, between on or about 1 February 2013 and 15 November 2015, the applicant had sexual intercourse with L.M., a woman not his wife
- on diverse occasions, between on or about 1 February 2013 and April 2014, the applicant had sexual intercourse with L.L., a woman not his wife
- on diverse occasions, between on or about 1 July and 24 December 2014, the applicant had sexual intercourse with C.L., a woman not his wife

18. The court sentenced the applicant to 25-years' confinement and dismissal from the service. In a subsequent post-trial session. Subsequently, the court remanded the applicant to confinement at the Midwest Joint Regional Correctional Facility, Fort Riley, KS. On 12 March 2018, the military judge reduced the applicant's term of confinement to 17-years, following the dismissal of two additional specifications of rape.

19. On 4 February 2020, the U.S. Army Court of Criminal Appeals ordered the convening authority's action set aside and returned the record of trial to The Judge Advocate General (OTJAG) for remand to the same or a different convening authority. The court directed a new Staff Judge Advocate Review and action and required the convening authority to consider all matters previously submitted by the applicant and any new matters submitted prior to taking action.

20. On 13 April 2020, the applicant submitted a Memorandum for Resignation for the Good of Service, in lieu of general court-martial, wherein he voluntarily tendered his resignation, under the provisions of AR 600-8-24, paragraph 3-13. He affirmed he did not want to appear before a board of officers, he submitted his request free of coercion, and was advised by legal counsel of the implications of his request. He further stated his resignation request was due to the persistent abuse he received from his chain of command, and the myriad of errors within the military justice system that had denied him a fair trial.

21. On 11 May 2020, the applicant submitted a request to the Secretary of the Army for remission, suspension, or discharge of the results of his court-martial and that he be granted an administrative discharge from the Army.

22. On 15 May 2020, the U.S. AMCOM, CG, recommended disapproval of the applicant's resignation for the good of the service.

23. Army Review Boards Agency (ARBA) Docket Number AR20200008263, shows the Army Ad Hoc Review Board reviewed the applicant's resignation for the good of the service, in lieu of trial by general court-martial. By order of the Secretary of the Army, the Deputy Assistant Secretary of the Army, ARBA, did not accept the resignation and directed the case be returned to the General Court-Martial Convening Authority for action as he deemed appropriate.

24. On 2 November 2020, the general court-martial convening authority approved the amended sentence of 17 years and discharge from service with a dismissal and, except for the part of the sentence extending to the dismissal, ordered the sentence executed. The applicant was credited for confinement served since 3 February 2018.

25. The applicant submitted a request to the ABCMR for revocation of his involuntary retirement and appropriate back pay beginning 1 February 2016.

a. In the processing of the case, the Chief, Officer Retirements and Separations Branch, AHRC, provided an Advisory Opinion on 7 April 2022, wherein he stated:

(1) With regard to the applicant's retirement revocation, the Commander, AMCOM, requested the applicant's retirement be revoked pending an investigation with a view towards court-martial.

(2) AHRC revoked the retirement under the provisions of Title 10, USC, Section 639. AR 600-8-24 delegated approval/disapproval for authority for retirements to AHRC. Even if AHRC did not revoke the applicant's retirement, the Commander, AMCOM, had the authority to recall the applicant to active duty for court-martial proceedings.

(3) With regard to backpay and allowances, the Chief, Officer Retirements and Separations Branch, indicated AHRC could offer no relief.

b. On 18 April 2022, ARBA provided the applicant a copy of the advisory opinion from AHRC for review and comment. The applicant submitted a response, arguing the advisory opinion contained numerous errors of law, regulation, and fact. On 25 April 2022, the applicant provided further arguments in response to the advisory opinion.

c. Docket Number AR20210011934, dated 26 May 2022, shows that after reviewing the application and all supporting documents, the ABCMR determined there was no evidence of violations of statute or regulation in the process leading to the applicant's eventual dismissal. The decision to deny the applicant's retirement in favor of court-martial proceedings was not in error or unjust. The Board found relief was not warranted and denied his request for relief.

26. The ABCMR reconsidered the applicant's request (see Supplement #2) for restoration of his involuntary retirement and the authorization of back pay, starting February 2016, in Docket Number AR20230005030, on 20 December 2023. After reviewing the application, all supporting documents, and the available military record, the Board conducted a comprehensive review of laws, policies, and regulations pertaining to the case. The Board determined there was insufficient evidence to support the restoration of the applicant's involuntary retirement and authorization for the repayment of back pay. Based upon the applicant's egregious patterns of misconduct and willing submission for separation from the Army, there was no error or injustice. The Board determined amending the previous decision was unwarranted.

27. The applicant provides:

a. Exhibit A, Memorandum, Reconsideration of ABCMR Case AR20210011934, dated 20 June 2023, and a Table of Contents for all appendices.

b. Exhibit B, Appendices 1 through 100, excerpts from AR 27-10 (Military Justice) and AR 25-50 (Preparing and Managing Correspondence), and U.S. v. Nettles, 74 M.J. 289 (C.A.A.C. 2015).

c. Exhibit C, Memorandum, Application for Retroactive Conscientious Objector Discharge, dated 20 June 2023.

d. Supplement 1, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 29 June 2023, and associated documents to include articles and information regarding the history of the "Molokan Russians."

e. Supplement 2, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 25 August 2023, and associated documents (Appendices 1 through 14) which were considered in ABCMR Docket Number AR20230005030 on 20 December 2023.

f. Supplement 3, Memorandum, Request for Reconsideration of ABCMR Case AR20210011934, dated 10 January 2023, and associated documents (Enclosures 1 through 5).

28. Regulatory guidance states an administrative separation by reason of conscientious objection will not be used instead of administrative separation procedures such as those provided for unsatisfactory performance, substandard performance of duty, or misconduct, or as otherwise set forth in other Army regulations.

BOARD DISCUSSION:

1. The applicant's request for reconsideration of his previous request for restoration of his involuntary retirement or in the alternative the issuance of a DD Form 214 (Certificate of Release or Discharge from Active Duty) showing a retroactive Conscientious Objector Discharge, effective 31 November 2015, his 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 Board reviewed all the new evidence and argument the applicant provided, to include all the arguments and documentation provided with ABCMR Dockets Number AR20210011934, dated 26 May 2022 and Number AR20230005030, dated 20 December 2023. The Board determined amending the previous decision was unwarranted.

a. The Board considered the request for retroactive Conscientious Objector Discharge, effective 31 November 2015, but found it lacks merit given the violent nature of some of the charges with which he was convicted.

b. The Board found no evidence of an error or injustice in this case. The evidence of record and that provided by the applicant failed to any violations of statute or regulation occurred in the process leading to the applicant's discharge. The Board further determined, and agreed the decision to deny the applicant's retirement in favor of court-martial proceedings was not in error or unjust.

c. The Board also determined there was insufficient evidence to support the restoration of the applicant's involuntary retirement and authorization for the repayment of back pay. The nature of the applicant's misconduct led to his court-martial conviction.



Nevertheless, he was still afforded every opportunity, to include making his own voluntary submission for separation from the Army in lieu of court-martial; there was no error or injustice.

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 to amend decision of the ABCMR set forth in Dockets Number AR20210011934, dated 26 May 2022 and AR20230005030, dated 20 December 2023.

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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, USC.

a. Section 632 requires the separation/retirement of Army officers on the active duty list in the grade of major who has failed selection for promotion to the next higher grade for the second time. The separation/retirement date will not be later than the first day of the seventh calendar month in which the President approves the report of the promotion selection board.

b. Section 639 authorizes the Secretary of the Army to delay an officer's retirement without prejudice when any action has commenced that may result in the officer's court-martial.

c. Section 688 states, under regulations prescribed by the Secretary of Defense, the Secretary of the Army may order a retired Regular Army member to active duty at any time, and, consistent with other provisions of law, the Secretary may assign the member to duties considered necessary in the interests of national defense.

d. Section 12731 outlines age and service requirements for non-regular (i.e., USAR) retired pay.

2. Article 2, UCMJ, states retired members of a regular component of the Armed Forces who are entitled to pay are subject to the UCMJ.

3. AR 15-185 (ABCMR), currently in effect, prescribes policies and procedures for the functioning of the ABCMR.

a. It states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of the ABCMR.

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. It is not an investigative body.

4. AR 27-10, in effect at the time, implemented policies and procedures pertaining to the administration of military justice within the Army. Chapter 5 (Procedures for Courts-Martial) states:

a. Retirees are subject to the UCMJ and may be tried by court-martial for violations of the UCMJ that occurred while they were on active duty or, while in a retired status.

DA Policy provides that retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present.

b. The regulation went on to require the approval of OTJAG prior to referral of court-martial charges. In cases where the appropriate court-martial convening authority sought the recall of the retiree to active duty, the convening authority had to route the request through OTJAG to the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) for approval.

5. AR 600-43 (Conscientious Objection), establishes uniform standards for processing conscientious objector applications during mobilization. Paragraph 1-5e provides that this regulation will not be used to effect the administrative separation of persons who do not qualify as conscientious objectors. Nor will it be used instead of administrative separation procedures such as those provided for unsatisfactory performance, substandard performance of duty, or misconduct, or as otherwise set forth in other Army regulations (AR 600-8-24 or AR 635-200 (Personnel Separations – Enlisted Personnel)). Under no circumstances will administrative separation of these persons be effected according to this regulation.

6. AR 600-8-24, in effect at the time, prescribed policies and procedures for the transfer of all officers on active duty for 30 days or more.

a. Paragraph 1-17 provides, an officer pending court-martial charges or investigation with a review toward court-martial will not be separated without Headquarters, Department of the Army (HQDA) approval.

b. Section V (Task: Process Separation of Commissioned Officers and Chief Warrant Officers who are Twice Non-Selected for Active Duty List Promotion by an HQDA Centralized Board), paragraph 5-9 (Rules for Processing Separation of Commissioned Officers and Chief Warrant Officers who are Twice Non-Selected for Active Duty List Promotion by an HQDA Centralized Board).

(1) The regulation required the involuntary release or discharge from active duty of commissioned Officers on the active duty list twice non-selected for promotion to lieutenant colonel unless they were retired or within 2 years of retirement (i.e., had completed 18 or more years of active Federal service on their scheduled release date).

(2) Retirement-eligible officers could apply for their retirement to be effective not later than the first day of the seventh month beginning after the month in which the President or Secretary of the Army had approved the promotion selection board's report.

c. Chapter 6 (Retirements) applied to non-disability retirements of active duty list commissioned officers on active duty who had 20 or more years of active Federal service.

(1) Paragraph 6-1f (The Officer Retirement Program) states, when an action is initiated against a commissioned officer with a view to trying such officer by court-martial, the Secretary of the Army may delay that officer's retirement (without prejudice) until the action is completed (per Title 10, USC, Section 639).

(2) Section II (Voluntary Retirements), paragraph 6-13 (Approval Authority) states:

(a) The Secretary of the Army is the approval authority for retirements. The Secretary of the Army has delegated approval authority for voluntary retirements (waiver/non-waiver) to CG, HRC-Alexandria. CG-HRC-Alexandria may approve, disapprove, or delay/defer the requested retirement date of an officer who has completed 20 but less than 30 years of active Federal service.

(b) Delegation of approval authority did not include "Mandatory retirements (when an officer has been notified by HQDA)."

(3) Section VI (Mandatory Retirement) addressed officers who were mandatorily retired based on law and initiated by HQDA; included were officers who had reached their maximum age, those selected for early retirement or selective retirement, per Title 10, Section 638 (Selective Early Retirement).

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.

//NOTHING FOLLOWS//