

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230010113

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

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief
- Orders for the Parachutist Badge, Air Assault Badge, Ranger Tab, and Combat Infantryman Badge
- Award orders for the Bronze Star Medal and Army Achievement Medal
- College Transcripts
- DD Form 214, Certificate of Release or Discharge from Active Duty (Enlisted, August 1994 to August 1997)
- DD Form 214 (Commissioned Officer, May 2000 to March 2009)
- Promotion Orders to captain (CPT)
- Officer Evaluation Reports (April 2001 to November 2004)

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's counsel provides a background of the applicant's military service, college education, awards and decorations, officer evaluation reports, and deployment. Counsel also states despite the lack of military records to thoroughly reflect the events that led to the applicant's discharge, his DD Form 214 indicates that he was discharged from the Army on 12 March 2009 with an under other than honorable discharge with the narrative reason for separation of "Court Martial." According to the applicant, he charged with violating the UCMJ (Uniform Code of Military Justice) for secretly recording his twelve year-old daughter. The Applicant was referred to a General Court Martial, where he was convicted and sentenced to an under other than honorable discharge. He completed 8 years, 7 months, and 24 days as an officer in addition to his

2 years, 11 months, and 10 days as an enlisted Soldier. Counsel also provides a timeline, jurisdiction, and legal standards, and makes an argument for equity:

a. The applicant has been punished enough for his misconduct a decade ago and should no longer continue to be stigmatized and unduly prejudiced as a result of his discharge from the Army. The applicant has been unjustly stigmatized and harmed by his other than honorable discharge, which has been recognized by various courts. On the other hand, if changing the punitive discharge to confinement will remove only the bad conduct discharge and not the possibility of a lesser administrative discharge with comparable collateral consequences, then a lessening of punishment is, at best, illusory. His under other than honorable (OTH) administrative discharge carries with it penalizing effects comparable to a bad conduct discharge.

b. Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community. There can be no doubt that a military discharge on other than honorable grounds is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the servicemember's character, patriotism, or loyalty.

c. The applicant's overall quality of service was honorable for the vast majority of his proud military career. This is evinced by the awards and decorations, including, the Bronze Star Medal and Army Achievement Medal, he received both as an enlisted Soldier and as commissioned officer. Despite the unfavorable discharge from the Army, he has strived to better himself since his discharge in order to be a respected member of his community and to better care for his family. He has earned his master's degree from the University [REDACTED] Business Administration in December 2012. Although he has had his good name and honor stripped away from him by his other than honorable discharge, he has not allowed this setback to define his life. He remains committed to learning from his mistakes, moving forward, and continuing to excel at every opportunity he is given. He will continue to be inequitably judged by anyone that reviews his DD Form 214 because of his discharge from the Army after more than 11 years of service, which he now seeks to rectify.

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

a. He served honorably on active duty, as a Regular Army enlisted Soldier from 26 August 1994 to 5 August 1997, completing 2 years, 11 months, and 10 days of active service.

b. He was appointed as a Reserve commissioned officer of the Army and executed an oath of office on 12 May 2000. He also entered active duty, as a commissioned officer, on this date.

c. He completed the Airborne and Ranger Courses, and was initially assigned as a Rifle Platoon Leader to 2nd Battalion, 187th Infantry, 101st Airborne Division at Fort Campbell, KY. He deployed to Afghanistan in 2002 and was awarded a Combat Infantryman Badge. He was promoted to CPT in October 2003.

d. Around May 2004, he was reassigned to III Corps Artillery at Fort Sill, OK. General Court-Martial Order Number 1, issued by Headquarters, Department of the Army, Washington DC, on 13 January 2009, shows:

(1) On 24 September 2005, the applicant was convicted of the Charge, Violation of Article 133, UCMJ: One specification of conduct unbecoming an officer and gentleman. At or near [REDACTED] on one occasion, between on or about 1 September 2004 and 31 October 2004, take indecent liberties with [REDACTED] a female under 16 years of age, not the wife of the accused, by dishonorably looking in the bathroom window from outside the house in order to view her naked body in the shower, with the intent to gratify his lust, which incident was observed by [REDACTED] the accused's wife. Plea: Not Guilty. Finding: Guilty.

(2) The court sentenced him to be confined for 30 days and to be dismissed from the service.

(3) On 8 September 2005, the convening authority approved the sentence, and except for the part of the sentence extending to Dismissal, ordered it executed. The automatic forfeitures as required by Article 58b, UCMJ, were waived on 26 May 2005, effective 7 June 2005 until 17 June 2005. That portion of the sentence extending to confinement has been served.

(4) On 15 November 2007, the United States Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. On 24 June 2008, the decision of the United States Army Court of Criminal Appeals was reversed as to the words "take indecent liberties" in Specification 1 of Charge II and the finding of guilty as to those words was set aside and those words were dismissed. The United States Court of Appeals for the Armed Forces affirmed the decision of the Court of Criminal Appeals as to the following amended Specification 1 of Charge II and the sentence: In that [Applicant], did, at or near [REDACTED] on one occasion, between on or about 1 September 2004 and on or about 31 October 2004, dishonorably look in the bathroom window from outside the house in order to view in the shower the naked body of [REDACTED] a female under 16 years of age, not the wife of the accused, with the intent to gratify the lust of the accused, an act that was observed by the accused's wife.

(5) The Assistant Secretary of the Army (Manpower and Reserve Affairs) ordered that: the sentence in the general court-martial case of [Applicant], pursuant to Article 71(b), UCMJ, as affirmed by the United States Army Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces, is approved and the dismissal is ordered executed.

4. The applicant was discharged from active duty on 12 March 2009 (amended to 2 January 2009). His (commissioned officer) DD Form 214 shows he was discharged in accordance with paragraph 5-17 of Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges) as a result of a court-martial with an under other than honorable conditions discharge. He completed 8 years, 7 months, and 24 days of active service during this period, and he had lost time from 24 May to 16 June 2005.

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 counsel's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct, the reason for his separation, and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors and found the evidence of in-service and post-service achievements provided in this case insufficient to support a favorable clemency determination in light of the serious misconduct that led to his discharge. 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:

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.

12/11/2024

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 600-8-23 (Officer Transfers and Discharges) prescribes the officer transfers from active duty (AD) to the Reserve Component (RC) and discharge functions for all officers on AD for 30 days or more.

a. Paragraph 5–17. Rules for processing dismissal of an officer due to general courts-martial proceedings. An officer convicted and sentenced to dismissal as a result of GCM proceedings will be processed pending appellate review of such proceedings as follows: (1) An RA officer will be retained on AD until the appellate review is completed or placed on excess leave in accordance with AR 600–8–10; and (2) An RC officer may be released from AD pending completion of the appellate review, under paragraphs 2–37 and 2–38, or placed on excess leave in accordance with AR 600–8–10 in lieu of release from active duty. The HRC will make the final determination regarding retention or separation. Separation instructions will be issued by HRC to the appropriate PSC/MPD.

b. Honorable characterization of service. An officer will normally receive an Honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty for an officer. Department of Defense (DD) Form 256A (Honorable Discharge Certificate) will be furnished to a

discharged officer; however, a certificate is not issued when an officer is released from AD. When the separation is based solely on preservice activities or substandard performance of duty, it will be Honorable.

c. Under Honorable Conditions characterization of service. An officer will normally receive an Under Honorable Conditions characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an Honorable discharge. DD Form 257A (General Discharge Certificate) will be furnished to a discharged officer; however, a certificate will not be issued when an officer is released from AD. A separation under honorable conditions will normally be appropriate when an officer—

(1) Submits an unqualified resignation or a request for REFRAD under circumstances involving misconduct.

(2) Is separated based on misconduct, including misconduct for which punishment was imposed, which renders the officer unsuitable for further service, unless an Under Other Than Honorable Conditions separation is appropriate.

(3) Is discharged for physical disability resulting from intentional misconduct or willful neglect, or which was incurred during a period of unauthorized absence.

(4) Is discharged under the Military Personnel Security Program if directed by HQDA.

d. Under Other Than Honorable Conditions characterization of service. A discharge Under Other Than Honorable Conditions is an administrative separation from the service under conditions other than honorable. A discharge certificate will not be issued. An officer will normally receive an Under Other Than Honorable Conditions when he/she:

- Resigns for the good of the service
- Is dropped from the rolls of the Army
- Is involuntarily separated due to misconduct, moral or professional dereliction, or in the interest of national security.
- Is discharged following conviction by civil authorities

5. 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.

//NOTHING FOLLOWS//