

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010162

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)
- DD Form 214 (Report of Separation from Active Duty) covering the period ending 22 February 1976

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 is requesting upgrade of his discharge under other than honorable conditions.
3. The applicant enlisted in the Regular Army on 5 September 1974.
4. Multiple DA Forms 2627 (Record of Proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ)) show the applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on the following occasions for the following misconduct:
 - a. on 22 January 1976, for without authority, failing to go at the time prescribed to his appointed place of duty at mandatory formation.
 - b. on 29 January 1976, for willfully disobeying an order on 21 January 1976 and again on 22 January 1976 to get a military-type haircut.

c. on 25 August 1976, for willfully disobeying a lawful order to remove his sunglasses on 24 August 1976, which he appealed on the same date and the appeal was subsequently denied.

d. on 29 October 1976, for failing to obey a lawful order to remove his left ammo pouch on 20 October 1976, which he appealed on 4 November 1976, and his appeal was subsequently denied. His punishment consisted of, in part, a reduction to the rank grade of private (PV2)/E-2.

5. A DD Form 458 (Charge Sheet), dated 14 December 1976, shows the applicant was charged with:

- failing to go at the time prescribed to his appointed place of duty at morning formation on 2 December 1976
- failing to go at the time prescribed to his appointed place of duty at morning formation on 5 December 1976
- failing to go at the time prescribed to his appointed place of duty at morning formation on 6 December 1976
- behaving with disrespect toward first lieutenant (1LT) S____, by saying to him, "Why don't you quit following me? I'm tired of looking at your ugly face her in my eyeball," on 7 December 1976
- willfully disobeying a lawful order to report to the dispensary for his flu shot on 26 November 1976
- willfully disobeying a lawful order from his first sergeant to not miss any more extra duty on 3 December 1979

6. Multiple DA Forms 4187 (Personnel Action) show the applicant's following duty status changes:

- from present for duty (PDY) to absent without leave (AWOL) effective 17 December 1976
- from AWOL to dropped from the rolls (DFR) on 17 December 1976; he was reported AWOL on 17 December 1976 after charges were preferred against him
- from DFR to attached effective 27 December 1976, when he surrendered to military authorities at Fort McClellan, AL, on 27 December 1976

7. A DA Form 3836 (Notice of Return of U.S. Army Member from Unauthorized Absence) shows the applicant was DFR on 16 December 1976 and surrendered to military authorities at Fort McClellan, AL, on 27 December 1976. He was pending court-martial at Fort Ord, CA and was transported from Fort McClellan to the U.S. Army

Personnel Control Facility (USAPCF) at Fort Knox, KY, on 28 December 1976, terminating apprehension efforts.

8. A Standard Form 88 (Report of Medical Examination) shows the applicant underwent medical examination on 4 January 1977, and was found qualified for separation with a physical profile rating of 1 in all factors.

9. An additional DA Form 2627 shows the applicant again accepted NJP under Article 15 of the UCMJ on 21 January 1977, for failing to obey a lawful order by leaving the company area without a pass on 19 January 1977, and disobeying a lawful order by not being present at bed check on 19 January 1977.

10. A second DD Form 458 shows on 27 January 1977, the applicant was charged with absenting himself from his unit without authority on 17 December 1976 and remaining absent until 27 December 1976.

11. On 27 January 1977, the applicant voluntarily requested discharge for the good of the service under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) chapter 10. He understood he may request discharge for the good of the service because charges were preferred against him under the UCMJ which authorize the imposition of a bad conduct or dishonorable discharge. By submitting this request for discharge, he acknowledged he was guilty of the charges against him. Prior to completing the form, he was afforded the opportunity to consult with appointed counsel and did consult with counsel, who advised him of the nature of his rights and the elements of the offenses. He acknowledged understanding he may be discharged under other than honorable conditions and was advised of the possible effects of an undesirable discharge, depriving him of many or all Army and Department of Veterans Affairs (VA) benefits.

12. With his request for discharge, the applicant submitted a self-authored statement, which shows, in pertinent part, he wanted to get out of the Army because he could not get a job and his attitude toward the Army after everyone telling him he is trouble. He enlisted in the Army to see what it was all about and what he would get out of it, but he went AWOL because he never gets to do the job he was schooled in and just sits on his behind, with everyone trying to keep him from advancing. If his discharge is approved, he can do more things and earn more money.

13. On 7 February 1977, both his immediate commander and his battalion commander recommended approval of the applicant's request for discharge under the provisions of Army Regulation 635-200, chapter 10, with an under other than honorable conditions characterization of service.

14. On 10 February 1977, the approval authority directed the applicants under other than honorable conditions discharge under the provisions of Army Regulation 635-200, chapter 10, and his reduction in rank/grade to private (PV1)/E-1.

15. The applicant's DD Form 214 shows he was given an under other than honorable conditions discharge on 22 February 1977, under the provisions of Army Regulation 635-200, chapter 10, with corresponding separation code JFS and the reentry codes 3 and 3B. He was credited with 2 years, 5 months, and 8 days of net active service, with 10 days of lost time from 17 – 26 December 1976.

16. The applicant previously applied to the Army Discharge Review Board (ADRB) and on 17 March 1980, he was advised that the ADRB disapproved his request, having determined he was properly discharged.

17. 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 any evidence or argument to show why the Board should apply liberal consideration, mitigation, or clemency.

a. In this case, the applicant, without coercion, voluntarily requested discharge in lieu of a trial by court-martial, after being advised by counsel.

b. There is no evidence of an error or injustice in this case.

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 10 (Discharge in Lieu of Trial by Court-Martial) provides that a member who committed an offense or offenses under the Uniform Code of Military Justice (UCMJ) for which the authorized sentence included a punitive discharge could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request can be submitted at any time after charges are preferred. Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation from the service and that the Soldier has no rehabilitation potential. A medical examination is not required but may be requested by the Soldier. A discharge under other than honorable conditions is normally appropriate for a Soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record during the current enlistment.

b. 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.

c. 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.

d. A discharge under other than honorable conditions (UOTHC) 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 a Soldier is discharged UOTHC, the separation authority will direct an immediate reduction to the lowest enlisted grade.

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. 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.

//NOTHING FOLLOWS//