

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 May 2024

DOCKET NUMBER: AR20230010223

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions and pay and allowances owed.

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

- DD Form 149 (Application for Correction of Military Record), 3 July 2023
- self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 13 March 1981

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, in effect, when serving at Fort Leavenworth Disciplinary Barracks, a Judge Advocate General (JAG) attorney informed him of his overturned case and asked him if he wanted to remain in the military, he said yes. He also was to receive back pay for his time being incarcerated, he said the JAG lawyer told him the Army would send him orders in the mail and he would go back to training.

a. Time went by and nothing was received, he made some phone calls to the JAG attorney and was told "they were still working on it and the paperwork was already sent out". He then was able to talk to the JAG attorney's replacement who he told him he was moving to Connecticut because of work.

b. The applicant was arrested by a State Trooper on his way to work and taken to a naval base in Connecticut. After a few weeks, he was escorted by military police from Fort Leavenworth, and escorted to Missouri. They got as far as the inside gate of the prison when he was informed it was all a mistake and that he was not a deserter or a criminal. The orders they had received to pick him up were wrong, and he was still in

the Army. During the false apprehension and processing timeline (almost a month), he lost his job and apartment.

c. He has tried to get his records straightened out; he previously received a postcard sized piece of mail saying he would be given his back pay within a 90-day period, to which he has never received any back pay from the Army. He is hoping to have his records straightened out and receive back pay.

3. The applicant enlisted in the Regular Army on 23 August 1974, for a 3-year period. He was awarded the military occupational specialty of 12B (Combat Engineer) and the highest rank he attained was private first class/E-3.

4. A general court-martial, adjudged on 30 September 1976, shows:

a. The applicant was arraigned and tried on 9 September 1976, for violations of the Uniform Code of Military Justice (UCMJ), for the following charge(s) and specification(s):

(1) One charge of committing an assault upon another Soldier by striking him with a means likely to produce grievous bodily harm to wit: a wooden club, and kicking him in the back, stomach, and face with his feet and that he further assaulted the Soldier by brandishing a dangerous weapon at him to wit: a knife on or about 19 July 1976.

(2) An additional charge of committing assault with two specifications. For committing an assault upon another Soldier, by striking him with his feet and by kicking him in the body and face with means likely to produce grievous bodily harm to wit: his feet on or about 1 July 1976. Additionally, for committing an assault upon private first class M.L.M., by pulling his toes of his left foot apart with his hands and did thereby intentionally inflicting grievous bodily harm upon him, to wit: a broken and dislocated toe on or about 1 July 1976.

(3) One charge of communicating a threat, when he unlawfully obtained ten dollars, he communicated to private first class M.L.M., a threat to assault the said Soldier on or about 1 July 1976.

b. He pled guilty and was found guilty of all charges and specifications.

c. His sentence was to be discharged from the service with a bad conduct discharge, confinement at hard labor for one year, forfeiture of all pay and allowances, and reduction to private/E-1.

d. On 9 December 1976, then sentence was approved.

5. On 1 July 1977, the unexecuted portion of the sentence to forfeiture pay and allowances was remitted and the applicant, having served the period of confinement was restored to duty pending completion of the appellate review.

6. On 17 January 1978, a correction was made to the general court-martial order changing the assault date of 19 July 1976 to read 14 July 1976.

7. On 19 January 1978, the findings and sentence were set aside and a rehearing may have been ordered by the same or a different convening authority due to the military judge failing to inquire fully into the pre-trial agreement, by failing to ask counsel about any unwritten terms and conditions, failing to ascertain if his interpretation of the agreement comported with counsel's understanding, and by failing to inquire completely in the terms for automatic cancellation and the sentence limitation. Further stating strict compliance was required.

8. General Court-Martial Order Number 59, dated 11 April 1978, ordered a rehearing before another court-martial.

9. On a DA Form 4187 (Personnel Action) shows the applicant's duty status changed from absent without leave (AWOL) to dropped from rolls (DFR) on or about 11 May 1978.

10. A DA Form 3835 (Notice of Unauthorized Absence from United States Army) shows the applicant was released on excess leave on or about 1 July 1977, and was to report for Fort Leavenworth, Kansas, pending rehearing of court-martial. The applicant failed to report with the effective date of 10 April 1978.

11. The applicant was apprehended by civil authorities on or about 29 December 1980, he was pending charges of robbery, assault, 2nd degree.

12. The applicant consulted with legal counsel on or about 4 March 1981.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a under other than honorable conditions discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, under the provision of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10 (Discharge for the Good of the Service). In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He

acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veteran's Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. He elected to not submit a statement on his own behalf.

13. On 9 March 1981, the applicant's immediate and intermediate commanders recommended approval of the applicant's request for discharge for the good of the service, with a service characterization of under other than honorable conditions.

14. The separation authority approved the applicant's request for discharge for the good of the service on 11 March 1981, further directing the applicant receive an under other than honorable conditions discharge and reduction to the lowest enlisted grade of private/E-1.

15. On 11 March 1981, General Court-Martial Order Number 2, shows a rehearing was no longer practicable as the applicant's request for discharge for the good of the service was approved.

16. The applicant was discharged on 13 March 1981, under the provisions of AR 635-200, Chapter 10, in the grade of E-1. His DD Form 214 confirms his character of service was under other than honorable conditions, with separation code JFS and reenlistment code RE-3B. He was credited with 5 years, 7 months, and 5 days of net active service with time lost from 5 January 1976 to 13 January 1976, 14 July 1976 to 5 October 1976, and from 7 October 1976 to 30 June 1977. He was placed in 316 days of excess leave from 1 July 1977 to 12 May 1978 and was retained in the service for 1299 days for the convenience of the government.

17. Discharges under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service from the Soldier to avoid a trial by court-martial. An under other than honorable conditions character of service is normally considered proper.

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

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 relief is not warranted.
2. The Board determined the applicant's discharge and characterization of service are appropriate, especially given the severity of the charges against him, to which he pled guilty; there is no apparent error or injustice. Additionally, the applicant did not provide any evidence in mitigation or of post service accomplishment.

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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, 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 under other than honorable conditions discharge is normally considered appropriate.

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.

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/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.

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, Boards 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.

//NOTHING FOLLOWS//