

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010245

APPLICANT REQUESTS: in effect, an upgrade of his under other than honorable (UOTHC) conditions character of service.

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

- DD Form 293, Application for the Review of Discharge
- applicant's statement

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:

a. He has been told that he was discharged due to his willful and persistent misconduct due to periods of absences. He contends that he had a valid reason for his absences, and he shared those reasons with his superior officers at the time. He further contends that he only received fines for being absent without leave (AWOL); therefore, he does not understand how his absences could be the reason for his discharge. If so, that would be double jeopardy and make his discharge unjust and unfair.

b. He also does not believe that his dishonorable discharge was due to habitual shirking of duty or acts of general discreditable nature. A review of his records will show that his discharge was a grave error. There was no officer or noncommissioned officer in his chain of command that accused him of shirking his duty. His chain of command stated that he was performing his duties. A review of his medical records will show he had torn ligaments from performing hazardous duty while assigned to the Company A, 82nd Airborne Division. He has been getting treatment ever since he was discharged. He is considered to be permanently disabled and his injury prevented him from

performing heavy duty. He was told to use a cane and not do any hazardous duty. He could only perform light duty because he was required to take rest for 10 minutes whenever he did a half hour duty which required standing. He was transferred from an Airborne unit to a Tank unit because he could not jump any longer. As such, he was removed from airborne status and became the lieutenant's driver. He contends that his new position caused problems with another lieutenant and that officer made the statements regarding him committing acts of a discreditable nature. The record will show that his lieutenant and sergeant wrote statements confirming he was able to perform his duties.

3. The record shows he enlisted into the Regular Army on 28 December 1973. The applicant held military occupational specialty 11C, infantry indirect fire crewmember. The highest rank/pay grade held was private first class/E-3, with a date of rank of 24 March 1971.

4. His DA Form 20, Enlisted Qualification Record, shows he was absent without leave (AWOL) of four occasions.

- 4 May 1971 to 5 May 1971
- 13 August 1971 to 6 September 1971
- 12 January 1972 to 8 March 1972
- 23 March 1972 to 27 March 1972

5. On 8 May 1971, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being absent from his place of duty from on or about 4 May 1971 to on or about 6 May 1971. His punishment included a reduction in rank/grade to private (PV2)/E-2, suspended for 30 days.

6. On 28 July 1971, the applicant was treated for an injury to his right hand and ring finger, and a fracture to his middle finger on the same hand. He received a temporary (T) level 3 (T-3) physical profile on 29 July 1971. This profile shows the applicant was restricted from using his right hand for two weeks.

7. Summary Court-Martial Order Number 71, 23 September 1971, published by Headquarters, 2nd Battalion (Airborne) 325th Infantry, Fort Bragg, NC, shows that before a summary court-martial at Fort Bragg, NC. The applicant pled guilty, and was found guilty, of being AWOL from on or about 12 August 1971 to on or about 6 September 1971. He was sentenced to reduction to private (PVT)/E-1, forfeiture of \$95.00 per month for one month, 30 days restriction, and 30 days hard labor without confinement. His sentence was adjudged on 15 September 1971.

8. On 23 September 1971, only so much of the sentence that pertained to the reduction in grade, forfeiture of pay, restriction, and extra duty was approved and ordered executed.

9. His DA Form 20 shows he was promoted to the rank of PV2/E-2 on 31 October 1971.

10. On 15 March 1972, the applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ for being absent from his unit from on or about 12 January 1972 to on or about 9 March 1972.

11. The applicant was command referred for a mental health and physical evaluation. Both evaluations were completed on 17 May 1972.

a. A Report of Mental Status Evaluation shows the applicant was found to have no significant mental illness. However, the report indicated the applicant's behavior was bizarre, his level of alertness was somnolent, and his thought content was abnormal. The mental health examiner found the applicant had the mental capacity to understand and participate in board proceedings and he met the retention standard prescribed in Army Regulation (AR) 40-501, Medical Services-Standard of Medical Fitness, chapter 3.

(1) The applicant included a handwritten note on this document, where he points to the signature block of the individual who performed the evaluation, was an "MD" Medical Doctor and not a psychiatrist, and therefore, he contends they were not qualified to render the evaluation.

(2) The evidence of record does not specifically include the examining official's medical specialty. However, it is important to note, a psychiatrist is a Doctor of Medicine (MD) or a Doctor of Osteopathic Medicine (DO) who specializes in mental health, including substance use disorders.

b. A Report of Medical Examination shows he was found qualified for separation. No significant defects were found during the examination.

12. On 19 May 1972, the applicant's commander recommended the applicant for elimination from the service under the provisions of AR 635-212, Personnel Separations -Discharge-Unfitness and Unsuitability, due to unfitness. The applicant acknowledged receipt on the same day.

13. On 23 May 1972, the applicant:

- requested consideration of his case by a board of officers
- requested a personal appearance before a board of officers

- requested representation by appointed counsel
- elected not to submit statements in his own behalf

14. The acting commander recommended the applicant be required to appear before a board of officers on 23 May 1972. He recommended the applicant be eliminated from the service in accordance with AR 635-212, for unfitness with an undesirable discharge. The discharge was recommended for elimination due to an established pattern of shirking duty, AWOL, and failure to repair. The commander stated that during the period from 29 March 1972 to the present date, the applicant had served under the same superior officer and noncommissioned officer and his performance of duty had been unsatisfactory. The applicant was unable to comprehend orders relating to his duty and he required constant supervision. The applicant received excellent conduct and efficiency ratings for the period 30 September 1970 to 7 December 1970. He received unsatisfactory conduct and efficiency ratings for the period 7 December 1970 to 12 August 1971.

15. The applicant completed a Statement of Medical Condition, 29 May 1972, wherein he indicated that he “still had knee problems.”

16. The applicant appeared before the board of officers on 22 June 1972 at Fort Knox, Kentucky.

a. The board transcript of the hearing shows, although his chain of command all testified the applicant did not perform his duties, several junior enlisted Soldiers reported the applicant did not shirk his duties and stated the chain of command was out to get the applicant.

b. This transcript also shows that the applicant’s counsel argued the applicant should be discharged due to unsuitability based on AR 635-212, paragraph 6b.

c. The board found that the applicant was undesirable for further retention in the military service because of habitual shirking and repeated commission of petty offenses. His rehabilitation was not deemed appropriate. The Board recommended the applicant be discharged from the service because of unfitness with the issuance of an undesirable discharge certificate.

17. On 7 July 1972, the applicant’s counsel submitted a request to change the reason for elimination from unfitness to unsuitability, thereby warranting a general rather than undesirable discharge. Counsel stated, in effect, the evidence from each of the government’s witnesses as well as that of the applicant shows his problems with the U.S. Army fell into the categories of inaptitude, character and behavior disorders, or apathy. These three categories were the essential grounds for unsuitability under AR 635-212. Based on the applicant’s attempt to adjust to the U.S. Army, personality

problems, behavioral disorders, apathy, indifference, and aptitude, his discharge should be based on unsuitability, rather than unfitness.

18. On 11 July 1972, the separation authority approved the findings and recommendation of the board. The separation authority further directed that the applicant be reduced to private/E-1, that he be discharged from the Army under the provisions of AR 635-212, paragraph 5b due to unfitness and he be issued an undesirable discharge certificate.

19. The applicant was discharged on 19 July 1972. His service was characterized as UOTHC. He completed 1 year, 6 months, and 22 days of net service for the period with 89 days of lost time.

20. Regulatory guidance, in effect at the time, provided that an individual was subject to separation for unfitness for various reasons to include frequent incidents of a discreditable nature with civil or military authorities. When separation for unfitness was warranted, an undesirable discharge was normally considered appropriate.

21. The Board should consider the applicant's overall record and provided statement in accordance with the published equity, injustice, or clemency determination guidance.

22. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

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 evidence of record shows applicant appeared before a Board of officers, who after reviewing his file, determined he was undesirable for further retention in the military service because of habitual shirking and repeated commission of petty offenses; the applicant was discharged with an under other than honorable conditions character of service.

3. The applicant did not provide any character reference letters, any evidence of post service accomplishments, or any other evidence for the Board to justify a clemency consideration.

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 (AR) 635-212, Personnel Separations-Discharge-Unfitness and Unsuitability, set forth the basic authority for the elimination of enlisted personnel for unfitness and unsuitability.

a. Paragraph 6 of the regulation provided that an individual was subject to separation for unfitness when one or more of the following conditions existed: frequent incidents of a discreditable nature with civil or military authorities; sexual perversion including but not limited to lewd and lascivious acts, indecent exposure, indecent acts with or assault on a child; drug addiction or the unauthorized use or possession of habit-forming drugs or marijuana; an established pattern of shirking; and an established pattern of dishonorable failure to pay just debts or to contribute adequate support to dependents (including failure to comply with orders, decrees or judgments). When separation for unfitness was warranted, an undesirable discharge was normally considered appropriate.

b. Paragraph 6b of the regulation provided that members who have been determined to suffer from character and behavior disorders were subject to separation for unsuitability. This regulation further provided that Soldiers separated by reason of unsuitability would be furnished an honorable or general discharge certificate as warranted by their military record.

3. AR 635-200, Personnel Separations-Enlisted Separations, provides:

a. 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.

b. 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.

4. 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.

5. Title 10, U.S. Code, section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

6. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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//