

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 May 2024

DOCKET NUMBER: AR20230011282

APPLICANT REQUESTS:

- to be paid separation pay
- appearance before the Board via video or telephonically

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, he was discharged while he was in Korea and never received his separation pay which he was entitled to for serving his country.

3. A review of the applicant's service record shows:

a. On 18 October 1967, the applicant enlisted in the Regular Army for a period of 3-years. His DA Form 20 (Enlisted Qualification Record) shows:

- served in Korea during the period of 29 April 1968 through 28 May 1969
- advanced or reduced in rank:
  - Private (PV2)/E-2, Date of Rank (DOR) 18 February 1968
  - Private First Class (PFC)/E-3, DOR 20 May 1968
  - PV2/E-2, 5 August 1968
  - PVT/E-1, 4 September 1968
  - PV2/E-2, 1 October 1968

- Lost time:

- Absent without Leave (AWOL), 5 August 1968
- AWOL, 1 September 1968
- AWOL, 2 through 5 December 1968
- AWOL, 19 through 23 December 1968

b. On 8 November 1967, the applicant accepted non-judicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for being absent from his unit. His punishment included forfeiture of \$20.00 pay for one month.

c. On 27 May 1968, Special Orders Number 148, issued by Headquarters (HQs), 7th Infantry Division, promoted him to PFC/E-3, effective 20 May 1968.

d. On 8 July 1968, the applicant accepted NJP under the provisions of Article 15, UCMJ, for failure to obey a direct order. His punishment included forfeiture of \$25.00 per month for 2-months and reduction to PV2/E-2; suspended for 2-months.

e. On 5 August 1968, the applicant accepted NJP under the provisions of Article 15, UCMJ, for being absent from his unit. His punishment included reduction to PV2/E-2, forfeiture of \$26.00 per month for 1-month and restriction for 14-days.

f. On 4 September 1968, the applicant accepted NJP under the provisions of Article 15, UCMJ, for being absent from his unit. His punishment included reduction to PVT/E-1, forfeiture of \$23.00 suspended for 60-days and 14-days restriction and extra duty.

g. On 21 November 1968, the applicant accepted NJP under the provisions of Article 15, UCMJ, for failure to go to his prescribed place of duty. His punishment included forfeiture of \$20.00 for one month and 14-days restriction and extra duty.

h. During the period of 6 December 1968 through 15 January 1969, the Criminal Investigative Division investigated the applicant based on the report on 6 December 1968, that he was found in possession of a substance believed to be marijuana which was found when he was apprehended for a pass violation.

i. On 31 December 1968, the applicant's immediate commander notified him of the convening of a board of officers to determine whether he should be discharged prior to his expiration term of service.

j. On 8 January 1969, after consulting counsel the applicant:

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

- did not submit statements in his own behalf
- requested representation by counsel
- may encounter substantial prejudice in civilian life
- may be issued an undesirable discharge
- may be ineligible for many or all benefits as a veteran under Federal and State laws

k. DD Form 493 (Extract of Military Records of Previous Convictions) shows HQs, 2nd Brigade, 7th Infantry Division Special Court-Martial Orders Number 9, the applicant was charged with:

- Charge 1: AWOL during the period of 2 through 6 December 1968
- Charge 2, Specification 1: possession of 12.65 grams of marijuana on 6 December 1968
- Charge 2, Specification 2: possession of an invalid DD Form 345 (Armed Forces Liberty Pass) on or about 6 December 1968
- Charge 1, Specification 1: restriction broken on 17 December 1968
- Charge 1, Specification 2: possession of an invalid DD Form 345 on 17 December 1968
- Charge 2: AWOL during the period of 19 through 24 December 1968
- Charge 3: possession of an invalid DA Form 31 (Request and Authority for Leave) on 24 December 1968

l. The court sentenced him to confinement at hard labor for 6-months, forfeiture of \$68.00 per month for 6-months. The sentence was adjudged on 22 January 1969 and approved on 25 January 1969.

m. On 26 February 1969, the applicant received a psychiatric examination which determined his condition was a character and behavior disorder and was not amenable to hospitalization, treatment in a military setting, disciplinary action, or reclassification to other forms of duty. His condition was a result of deficiencies in personality development of such severity to render him unsuitable for military service. It was recommended the applicant be separated from military service. He had the capacity to distinguish right from wrong, and adhere to the right, he was considered mentally responsible for his actions. He could understand board proceedings and met the retention conditions prescribed in Army Regulation (AR) 40-501 (Standards of Medical Fitness).

n. On 3 March 1969, the applicant's immediate commander recommended he be required to appear before a board of officers to determine whether he should be discharged before his expiration term of service for unsuitability due to his habit and traits of character which manifested by repeated commission of petty offenses and habitual shirking. The commander requested a waiver for rehabilitative requirements.

o. On 4 March 1969, the applicant's intermediate commander recommended approval of the discharge for unfitness and on 6 March 1969, the applicant's senior commander recommended approval of the discharge for unfitness.

p. On 28 March 1969, Special Court-Martial (SCM) Orders Number 22, issued by HQs, 7th Infantry Division, the findings of guilty and the sentence in the SCM, which was adjudged on 22 January 1969 and promulgated in HQs, 2nd Brigade, 7th Infantry Division SCM Orders Number 9 were set aside. The defense counsel for the applicant was excused from the case without the express consent of the applicant and another defense counsel was not detailed. The appointed assistant defense counsel acted as the defense counsel without proper authority. This was prejudicial to the substantial rights of the applicant. For this reason, the findings and sentence were disapproved. All rights, privileges, and property of which he was deprived by the virtue of the findings of guilty and the sentence had been set aside will be restored.

q. On 7 April 1969, the separation authority waived the requirement for rehabilitative reassignment, and he would be permitted to appear before the board of officers.

r. On 9 April 1969, the applicant was notified the board of officers would convene on 24 April 1969 to determine whether he should be discharged for unfitness before his expiration term of service.

s. On 10 April 1969, the applicant acknowledged the notification to appear before the board at the U.S. Army Confinement Facility. The applicant waived the 15-day period to prepare for his case.

t. On 25 April 1969, the board of officers convened, and the board found the applicant unfit for further retention in the military service because of his habits and traits of character that was manifested by repeated commission of petty offenses and habitual shirking and rehabilitation was not deemed possible. The board recommended he be discharged from the service for unfitness and be issued a general under honorable conditions discharge.

u. On 14 May 1969, a legal review found the elimination file on the applicant was legally sufficient.

v. On 28 May 1969, the applicant acknowledged the notification of his discharge for unfitness. Also on that date, Special Orders Number 148, issued by HQs, 7th Infantry Division, the applicant was ordered to report for transportation from Korea to the Continental United States for assignment to the Separation Transition Station, Fort Lewis, WA, effective June 1969.

w. On 2 June 1969, the convening authority directed the applicant be discharged for unfitness and be furnished a general under honorable conditions discharge.

x. On 5 June 1969, Special Orders Number 156, issued by HQs, U.S. Army Personnel Center, the applicant was discharged effective 5 June 1969 with a general under honorable conditions as a result of a board action and not by reason of physical disability.

y. On 10 June 1969, Special Orders Number 161, issued by HQs, U.S. Army Personnel Center, amended Orders Number 156 to read the applicant was discharged on 10 June 1969.

z. On 10 June 1969, the applicant was discharged with a general under honorable conditions characterization of service under the provisions of Army Regulation 635-212 (Discharge Unfitness and Unsuitability). DD Form 214 shows the applicant completed 1-year, 7-months, and 6-days of active service. It also shows the applicant had 17-days of lost time occurring on 5 August 1968, 1 September 1968, 2 through 5 December 1968, 19 through 23 December 1968 and 5 through 10 June 1968.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record 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.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the applicant's chain of command recommended his separation for unfitness (misconduct) following a series of NJPs and a conviction by a court-martial. A board of officers convened and found him unfit for further retention in the military service because of his habits and traits of character that was manifested by repeated commission of petty offenses and habitual shirking, and rehabilitation was not deemed possible. The board recommended he be discharged from the service for unfitness and be issued a general under honorable conditions discharge. He was discharged accordingly after completing 1 year and 7 months of active service with multiple periods of lost time. Service members who separated under certain circumstances are not eligible for separation pay, and include Soldiers separated for performance, misconduct, or other disciplinary reasons. Since the applicant was discharge for unfitness (misconduct), the Board determined the applicant does not qualify for separation pay.

3. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

ADMINISTRATIVE NOTE(S):

1. Reference the enclosed request for correction of military records from the subject individual to correct his DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) for the period ending June 10, 1969, by adding the Korea Defense Service Medal.
2. A review of the records listed below (enclosed) is sufficient to substantiate correction of the DD Form 214 without action by the Board.

- DD Form 214 service ending June 10, 1969
- DA Form 20 (Enlisted Qualification Record)

3. Please correct the applicant's DD Form 214 by adding the award shown in paragraph 1 above. Provide the applicant a copy of the correction, and as applicable the medal and ensure the correction is recorded in the official military personnel record.

#### REFERENCES:

1. Title 10, USC, 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. Title 10 USC, section 1174 (Separation pay upon involuntary discharge or release from active duty), (b) (Regular Enlisted Members), regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20-years of active service immediately before that discharge is entitled to separation pay unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

3. Department of Defense (DoD) Instruction 1332.29 (Involuntary Separation Pay (ISP) (Non-disability), this issuance establishes policy, assigns responsibilities, and prescribes procedures concerning eligibility and requirements for receipt of separation pay for Active and Reserve Component Service members who are involuntarily separated from active duty or active service (AD/AS) in accordance with Title 10 USC, section 1174. Full payment of non-disability ISP is authorized to Service members of the Active and Reserve Components who are involuntarily separated from AD/AS and who meet each of following five conditions:

- service member has completed at least 6-years, but fewer than 20 years, of AD/AS, period of AD/AS is continuous if any break in military service does not exceed 30-days
- service member's separation is characterized as "honorable" and none of the conditions in Paragraph 3.4. apply
- service member is being involuntarily separated by the Military Service concerned through either the denial of reenlistment or the denial of continuation on active duty under one of the following specific conditions: (a) fully qualified for retention, but is denied reenlistment or continuation by the Military Service concerned

- service member has entered into a written agreement with the Military Service concerned to serve in the Ready Reserve of a Reserve Component of the Military Services for a period of not less than 3-years following the separation from AD/AS
- service member has signed the following mandatory disclosure statement: "If I qualify for military retired or retainer pay

Limitations On Eligibility For Separation Pay, service members separated under the following circumstances are not eligible for ISP when separation is for performance, misconduct, or other disciplinary reasons, as specified in DoDI 1332.14, an enlisted Service member who is separated for unsatisfactory performance, except when half ISP is specifically allowed in accordance with Paragraph 3.1.b., or an enlisted service member who is separated for misconduct. A service member who is separated as a result of execution of a court-martial sentence. A Service member who is dropped from the rolls of the Military Service concerned. A Service member who is separated under other than honorable conditions.

4. AR 635-212 (Personnel Separations - Discharge Unfitness and Unsuitability) in effect at the time, established policy and procedures and guidance for eliminating enlisted personnel who are found to be unfit or unsuitable for further military service. An individual is subject to separation under the provisions of this regulation when one or more of the following conditions exist:

a. Unfitness – frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addition or unauthorized use or possession of habit forming drugs or marijuana, established pattern for shirking, pater showing dishonorable failure to pay debts or failure to contribute adequate support to dependents.

b. Unsuitability – Inaptitude, character and behavior disorders, apathy, defective attitudes, and inability to expend effort, alcoholism, enuresis, or homosexuality.

5. AR 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. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//