

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 June 2024

DOCKET NUMBER: AR20230011584

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

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- State Radiologic Technology Certificate
- Certificate of Program Completion
- State Board of Medical Radiologic Technology Letter
- State Candidate Exam Results

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, United States Code (USC), section 1552 (b) (Correction of Military Records: Claims Incident Thereto). 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, since his discharge, his reputation as a law-abiding citizen and productive member of his community has prevailed.

a. The applicant notes he currently holds a temporary license as an LMRT (Limited Medical Radiologic Technologist) and is in the process of acquiring his permanent license; in addition he works for an urgent care clinic as an assistant and as an x-ray technician.

(1) He hopes to acquire licensing to be a medical assistant or emergency room technician. He maintains his experience in the Army is the reason for his strong work ethic and his ability to persevere, but the nature of his discharge has caused delays in the aforementioned process.

(2) In support of his request, the applicant provides documentation showing that he successfully completed a program for LMRT-Medical Assistant; that he passed his State examination; and currently holds a State license as an LMRT.

b. The applicant asks the Board to consider his accomplishments while on active duty, as reflected on his DD Form 214; he earned the following personal decorations and service medals: Army Commendation Medal, Army Achievement Medal (7th Award), Army Good Conduct Medal (2nd Award), National Defense Service Medal, Armed Forces Expeditionary Medal, Army Service Ribbon, Overseas Service Ribbon with Numeral "2," and Marksman Marksmanship Qualification Badge with Rifle Bar.

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

a. On 10 June 1997, the applicant enlisted into the Regular Army for 2 years and 19 weeks; he was 18 years old. Upon completion of initial entry training and the award of military occupational specialty 13F (Fire Support Specialist), orders assigned him to a field artillery battalion in Korea, and he arrived at his new unit, on or about 3 December 1997.

b. Following the completion of his tour in Korea, permanent change of station (PCS) orders reassigned him to Fort Riley, KS; he arrived, on 11 January 1999. On 11 March 1999, he immediately reenlisted for 5 years, and, effective 1 December 2000, his chain of command promoted him to sergeant (SGT)/E-5. In or around September or October 2001, the applicant received reassignment instructions for Fort Wainwright, AK, and he arrived at new his unit on 20 November 2001.

c. On 12 January 2002, the applicant and a group of other military members and a civilian were involved in an off-post incident in which an airman lost his life. On 4 March 2002, after being warned of his rights, the applicant provided the U.S. Army Criminal Investigation Command (CID) the following sworn statement:

(1) On the night of 11 January 2002, the applicant went to Ms. [REDACTED] off-post apartment; around 2245, the applicant and another Soldier [REDACTED] decided to go to a local lounge. Because it was near closing time, the applicant and [REDACTED] left to go back to the base, but two other Soldiers [REDACTED] decided to stay, saying they would catch a ride. The applicant dropped off his friend [REDACTED] at his friend's barracks, then went to his own barracks to sleep. The next morning, [REDACTED] (one of the two Soldiers who had stayed behind) woke up the applicant to say someone had "jumped" him and [REDACTED] the night before. The applicant went back to sleep and arose later that afternoon.

(2) On the afternoon of 12 January, and as he often did, the applicant went over to the other barracks to "hang out" in [REDACTED] and [REDACTED] room. That evening, after the applicant had drunk one to three beers, "everyone was talking about [REDACTED] and [REDACTED]

getting jumped. Somebody said that the guys that jumped them were over at (Ms.) [REDACTED] (apartment). Everyone (including the applicant) got into their vehicle(s) and headed to (Ms.) [REDACTED] (apartment)."

(3) The applicant arrived at Ms. [REDACTED] place and waited in his truck with a couple of his friends; someone eventually came out and said the assailants were not there. The applicant and his friends then went to Ms. [REDACTED] apartment, and Ms. [REDACTED] said she knew where the assailants lived; she left with her boyfriend to find them. On her return, she told the group the two assailants were in a nearby trailer park, and everyone, including the applicant, got into their vehicles and headed to the assailants' trailer; the applicant was the last vehicle in the line of cars.

(4) Along the way, the line of cars stopped, and someone got out of one of the cars and started talking to another person; the applicant never got out of his vehicle and could not hear what was being said. Everyone then got back into their vehicles and continued on to the trailer park; when they got there, the applicant dropped off [REDACTED] and another Soldier near the trailer while the applicant looked for a parking spot. After exiting his vehicle and walking a short distance up the road, the applicant "heard something muffled. It sounded like a knocking. I then heard the (glass) break and then the gunshots. I ran to my truck and started it up. Some other guys got in the truck with me and someone jumped in the back."

(5) The applicant drove down the road, through a wood line, and into a large open area before returning to the road. "By the time we got to the main (road), we saw two cars with (their) flashers on. We were following them. They were going (too) fast for me. I could not keep up. We did not know what was going on." The applicant drove to the local lounge and dropped off two of his friends; he then brought another two friends to Ms. [REDACTED] apartment before returning to the lounge to join his friends. They all remained at the lounge until shortly before closing time, when they left for their barracks to sleep. The next morning, the military police showed up at the applicant's door.

d. On 2 May 2002, the applicant's command preferred court-martial charges against him. The applicant's DD Form 458 (Charge Sheet) lists the following Uniform Code of Military Justice (UCMJ) violations:

(1) Article 81 (Conspiracy). On 12 January 2002, the applicant conspired with 20 others to commit an aggravated assault, housebreaking, and a breach of the peace, and, to effect the object of that conspiracy, the applicant and twenty others entered the home of Mr. [REDACTED] while armed with entrenching tools, brass knuckles, a metal table leg, a nail hammer, sticks, a stun gun, and a 9 millimeter (mm) handgun.

(2) Article 92 (Violation of a General Regulation); two specifications.

- On 12 January 2002, the applicant (while holding the rank/grade of sergeant (SGT)/E-5) violated Army Regulation (AR) 600-20 (Army Command Policy) by fraternizing with eleven lower enlisted Soldiers and conspiring to commit aggravated assault, housebreaking, and a breach of the peace
- On 22 March 2002, the applicant (while holding the rank/grade of SGT/E-5) violated AR 600-20 by fraternizing with two lower enlisted Soldiers by drinking alcohol to excess

(3) Article 116 (Breach of the Peace). On 12 January 2002, the applicant caused a breach of the peace by wrongfully going to a trailer park with twenty others who were armed with entrenching tools, brass knuckles, a metal table leg, a nail hammer, sticks, a stun gun, and a 9mm handgun in order to commit the offense of aggravated assault on Mr. [REDACTED] and Mr. [REDACTED].

(4) Article 130 (Housebreaking). On 12 January 2002, Specialist (SPC) [REDACTED] unlawfully entered the dwelling of Mr. [REDACTED] with the intent to commit an aggravated assault.

e. On 10 May 2002, and in exchange for testimonial immunity, the applicant offered, in writing, to request discharge under the provisions of chapter 10 (Discharge in Lieu of Trial by Court-Martial), AR 635-200 (Personnel Separations – Enlisted Personnel); to cooperate in any subsequent investigations and in the trials against his co-conspirators; and to conditionally waive his right to an Article 32, UCMJ investigation.

f. Also, on 10 May 2002, after consulting with counsel, the applicant voluntarily requested discharge in-lieu of trial by court-martial under chapter 10, AR 635-200. In his request, he affirmed no one had subjected him to coercion, and counsel had advised him of the implications of his request. The applicant further acknowledged he was guilty of the charges against him; he elected to submit statements in his own behalf, but those statements are not available for review.

g. On 15 May 2002, the General Court-Martial Convening Authority (GCMCA) accepted the applicant's offer. On 17 June 2002, the separation authority (also the GCMCA) approved the applicant's separation request and directed his under other than honorable conditions discharge; in addition, the separation authority ordered the applicant's reduction from SGT to private (PV1)/E-1. On 26 June 2002, orders discharged the applicant accordingly.

h. The applicant's DD Form 214 shows he completed 5 years and 17 days of net active duty service, of which he served 3 years, 3 months, and 16 days on his 5-year reenlistment contract. The report additionally reflects the following:

(1) Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) lists the following:

- Army Commendation Medal
- Army Achievement Medal (7th Award)
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Army Service Ribbon
- Overseas Service Ribbon with Numeral "2"
- Marksman Marksmanship Qualification Badge with Rifle Bar

(2) Item 18 (Remarks) shows the applicant's continuous honorable service from 19970610 through 20020708.

(3) Special Additional Information:

- Item 25 (Separation Authority) – AR 635-200, chapter 10
- Item 26 (Separation Code (SPD)) – "KFS"
- Item 27 (Reentry (RE) Code) – RE-3 (waiver required for reenlistment)
- Item 28 (Narrative Reason for Separation) – "In Lieu of Trial by Court-Martial"

BOARD DISCUSSION:

1. 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 the applicant's statement, his record of service, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency.

2. A majority of the Board found the applicant's post-service achievements and his duty performance prior to the incident that led to his discharge support clemency. A majority of the Board determined the applicant's character of service should be changed to under honorable conditions (general). Because the sole reason for the applicant's reduction to the lowest enlisted pay grade was his original character of service, this correction will entail restoration of his rank and grade.

3. The member in the minority found insufficient evidence of in-service mitigating factors and found the evidence of post-service achievements provided by the applicant insufficient in support of a clemency determination. The member in the minority noted the serious nature of the charges against the applicant as a basis for denying relief. Based on a preponderance of the evidence, the member in the minority 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 Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general) and to show he held the rank/grade of SGT/E-5.

11/1/2024

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, 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. AR 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 3-7b (General Discharge). A general discharge was a separation under honorable conditions and applied to those Soldiers whose military record was satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

b. Paragraph 5-3 (Secretarial Plenary Authority) stated the separation of enlisted personnel was the prerogative of the Secretary of the Army and was to be executed per the Secretary's authority, on a case-by-case basis. It was ordinarily used when no other provision applied, and early separation was clearly in the best interests of the Army. Soldiers being separated for the convenience of the Government will be awarded a character of service of honorable, under honorable conditions, or an uncharacterized description of service, if in entry-level status. No Soldier was to be awarded a character of service under honorable conditions unless the Soldier was notified of the specific factors in his/her service record that warranted such a characterization.

c. Chapter 10 applied to Soldiers who had committed an offense or offenses for which the punishment under the UCMJ included a punitive (i.e., bad conduct or dishonorable) discharge. Soldiers could voluntarily request discharge once charges had been preferred; commanders were responsible for ensuring such requests were personal decisions, made without coercion, and following being granted access to counsel. Commanders were to give the Soldier a reasonable amount of time to consult with counsel prior to making his/her decision. The Soldier made his/her request in writing, which certified he/she had been counseled, understood his/her rights, could receive an under other than honorable conditions character of service, and recognized the adverse nature of such a character of service. Consulting counsel was to sign the request as a witness.

3. Manual for Courts-Martial, in effect at the time, showed punitive discharges were among the maximum punishments for the following violations of the UCMJ:

- Article 81 (Conspiracy) – this article carries the same maximum punishment as the offense that was the object of the conspiracy (i.e., aggravated assault and housebreaking)

- Article 92 (Violation of a General Regulation)
- Article 130 (Housebreaking) – each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it

4. AR 600-8-19 (Enlisted Promotions and Reductions), in effect at the time, prescribed policies and procedures for enlisted promotions and reductions. Chapter 7 (Reductions in Grade) stated Soldiers approved for an under other than honorable conditions discharge were to be reduced to the lowest enlisted grade.

5. AR 635-5 (Separation Documents), in effect at the time, prescribed policies and procedures for DD Form 214 preparation. The regulation stated the narrative reason for separation was tied to the Soldier's regulatory separation authority and directed DD Form 214 preparers to AR 635-5-1 (Separation Program Designators (SPD)) for the appropriate entries in item 28 (Narrative Reason for Separation).

6. AR 635-5-1, in effect at the time, stated Soldiers separated in accordance with chapter 10, AR 635-200 were to receive the SPD of "KFS" and have, "In Lieu of Trial by Court-Martial" entered in item 28 of their DD Form 214.

7. AR 601-210 (Regular Army and Army Reserve Enlistment Program), in effect at the time, prescribed policies and procedures for the reenlistment of current and former Soldiers.

a. Paragraph 3-22 (U.S. Army Reentry Eligibility (RE) Codes) showed the following:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for immediate reenlistment unless waiver consideration is permissible and is granted
- RE-4 – Not eligible for reenlistment. Nonwaivable disqualification

b. Paragraph 4-9 (Prior Military Service) stated an enlistment waiver was required for any applicant who was separated or discharged for the good of the service (i.e., in lieu of trial by court-martial).

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

//NOTHING FOLLOWS//