

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230011690

APPLICANT REQUESTS: reconsideration of his previous request to upgrade his under other than honorable conditions discharge. He also requests a personal appearance by video or telephone.

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20040011495 on 2 August 2005.
2. The applicant states he has spent his life making changes in himself after his discharge. He has worked for the city [REDACTED] for several years and he is now retired. An upgrade would allow him an opportunity to seek medical care through the Department of veterans Affairs, especially that he now has cancer.
3. The applicant enlisted in the Regular Army on 11 February 1977, for 3 years. He held military occupational specialty 19F, Tank Driver.
4. On 9 May 1977, while in training, he accepted nonjudicial punishment under Article 15 for assaulting another Soldier. His punishment consisted of forfeiture of \$50.00 per month for one month and three days restriction.
5. He served in Germany with 1st Battalion, 32nd Armor from 26 June 1977 to 21 September 1977. During this period of service:
6. On 22 September 1977, before a special court-martial that convened at Headquarters, 3rd Armored Division, Germany, the applicant was convicted of one specification of assaulting another Soldier on 24 July 1977. The court sentenced him to reduction to private/E-1, confinement at hard labor for two months, and forfeiture of \$150.00 per month for two months.

7. The applicant was reassigned to the U.S. Army Retraining Brigade at Fort Riley, KS.
8. On 15 December 1977, Headquarters, U.S. Army Retraining Brigade [Fort Riley] published Special Court-Martial Order Number 805, that suspended the unexecuted portion of the applicant's sentence. His punishment of forfeiture of \$150.00 per month for two months was suspended until 27 February 1978. The Court-Martial order directed that, unless the suspension was sooner vacated, the suspended portion of the sentence will be remitted without further action.
9. The applicant was reassigned to Fort Hood, TX around January 1978.
10. On 5 June 1978, he accepted nonjudicial punishment under Article 15 for being disrespectful by yelling at his superior noncommissioned officer. His punishment consisted of confinement for seven days.
11. On 8 June 1978, the applicant's punishment of seven days confinement was mitigated to nine days of extra duty and nine days of restriction.
12. The complete facts and circumstances surround his discharge are not available (separation packet is not available). However, the applicant's service record contains a DD Form 214 (Report of Separation from Active Duty) that shows he was discharged on 28 September 1978, under the provisions Army Regulation (AR) 635-200 (Personnel Separations), chapter 14-33B, for misconduct with his service characterized as under other than honorable conditions. He completed 1 year, 5 months, and 29 days of active service and he had 50 days of lost time.
13. There is no indication that the applicant applied to the Army Discharge Review Board for an upgrade of her discharge within its 15-year statute of limitations.
14. On 4 August 2005, the ABCMR denied his request for an upgrade of his discharge. The Board stated:
 - a. The discharge packet is not available in the applicant's personnel records. However, in the absence of evidence to the contrary, it is determined that all requirements of law and regulations were met, and the rights of the applicant were fully protected through the separation process.
 - b. Army Regulation clearly provides that military discharges are based on the quality of the Soldier's military service in accordance with published standards. The applicant's record of service shows a special court-martial for assault. His record of service also shows that the applicant received two nonjudicial punishments and only completed 18 months of his required 36 months of service and accrued 50 days of lost time. The applicant's acts of misconduct are not acceptable conduct or performances which merit

an honorable discharge. In view of these facts, the applicant's service also was not satisfactory, and he is, therefore, not entitled to a general discharge.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, 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. The Board found insufficient evidence of in-service mitigating factors and the applicant provided insufficient evidence of post-service achievements and no letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

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:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20040011495 on 2 August 2005.

12/11/2024

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. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, convictions by civil authorities, desertion, or absence without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. Paragraph 14-33 (Other Misconduct) states commanders identified Soldiers for discharge when they displayed a pattern of misconduct; this included Soldiers who were involved in frequent incidents of a discreditable nature with civil or military authorities. An under other than honorable conditions character of service was normally issued for Soldiers discharged under this provision.

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 (emphasis added) or is otherwise so meritorious that any other characterization would be clearly inappropriate. Whenever there is doubt, it is to be resolved in favor of the individual.

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. A characterization of under honorable conditions may be issued only when the reason for the soldier's separation specifically allows such characterization.

2. 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.

3. Army Regulation 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, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it 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//