

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 June 2024

DOCKET NUMBER: AR20230011846

APPLICANT REQUESTS: upgrade of his undesirable discharge to general, under honorable conditions.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD: DD Form 149 (Application for Correction of Military Record), 1 August 2023.

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, he was discharged after being incarcerated in New Jersey. He was a passenger in a vehicle that was pulled over for going too slow. The driver had illegal items in the vehicle that he did not know about. He was released within 6 months and returned to duty, then discharged. The discharge is more severe than what the offense should warrant.
3. A review of the applicant's service records shows:
 - a. On 21 June 1973, he enlisted in the Regular Army for a period of 3 years.
 - b. On 16 August 1973, he was promoted to private 2/E-2.
 - c. On 15 October 1973, he was assigned to Service Battery, 1st Battalion, 39th Field Artillery, Fort Bragg.
 - d. On 14 December 1973, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for violation of a lawful general regulation; parking in an unauthorized space. His punishment consisted of an oral reprimand. He did not appeal this punishment.

e. On 19 February 1974, he accepted NJP under the provisions of Article 15 of the UCMJ for failing to go at the time prescribed to duty at work formation at Service Battery, 1st battalion, 39th Field Artillery on 11 February 1974, 12 February 1974, 13 February 1974, 14 February 1974, and on 15 February 1974. His punishment consisted of reduction to private/E-1, forfeiture of \$84.00 for 1 month, and 7 days restriction and extra-duty. He did not appeal this punishment.

f. On 11 March 1974, the forfeiture of \$84.00 per month for one month imposed against him on 19 February 1974 was remitted to forfeiture of \$76.00 per month for one month.

g. A memorandum from the Adjutant General, to the Commanding General, XVIII Airborne Corps Artillery, Fort Bragg, dated 28 August 1974, subject: Arrested by Civil Authorities, recommended separation be considered under the provisions of Army Regulation 635-206 (Discharge – Misconduct – Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion), based on a report from the Department of Justice, Federal Bureau of Investigation, pertaining to the applicant.

h. A Department of Justice, Federal Bureau of Investigation, report dated 7 August 1974 shows he was apprehended in (City), North Carolina, for felonious breaking or entering and larceny. It further listed other pending charges from March of 1974.

g. A Judgment of the Superior Court of (County), of the State of North Carolina, dated 30 August 1974, shows he entered a plea of guilty to the crime of felonious breaking and entering. It was ordered he be placed on probation for 2 years; pay the Superior Court \$150.00 as restitution; return to the U.S. Army and abide by all the rules, regulations, and orders of the U.S. Army; pay Cost of Court in the amount of \$272.00; first payment due by 1 November 1974; like payment of \$50.00 per month until all monies were paid in full.

h. A Probation Judgment of the Superior Court of (County), of the State of North Carolina, dated 30 August 1974, shows he entered a plea of guilty to felonious larceny and was ordered to be sentenced by the court to the custody of the commissioner of correct to five years as a regular youthful offender; aforesaid sentence of five years suspended and he was placed on probation for five years.

i. A Judgment Suspending Sentence of the Superior Court of (County), of the State of North Carolina, dated 30 August 1974, shows he:

- entered a guilty plea to felonious larceny and the Superior Court adjudged imprisonment for five years in the North Carolina Department of Corrections as a regular and youthful offender

- entered a guilty plea to felonious breaking or entering and the Superior Court adjudged continuance of sentence not to exceed two years
- was placed on probation for five years
- must pay the Superior Court \$150.00
- must return to the U.S. Army and abide by all rules and orders of the U.S. Army

j. On 7 November 1974, his Company Commander, Service Battery, 1st Battalion advised him he intended to recommend his discharge under the provisions of Army Regulation 635-206, by reason of conviction by a civil court, that he may receive an undesirable discharge, and notified him of his rights. He understood he could request appointment of military counsel to represent him, and in his absence, present his case before a board of officers; submit statements in his own behalf; waive his rights in writing; or request that a board of officers hear his case.

k. On 11 November 1974, he elected his rights. He waived representation by counsel, elected not to submit statements in his own behalf, and indicated he did not intend to appeal his civil conviction or adjudication as a juvenile offender. He further understood that he may expect to encounter substantial prejudice in civilian life in the event a general discharge under honorable conditions were issued to him. He further understood that, as a result of issuance of an undesirable discharge under conditions other than honorable, he may be ineligible for many or all benefits as a Veteran under both Federal and State Laws.

l. On 14 November 1974, his Battalion Commander recommended approval of his discharge.

m. The Staff Judge Advocate, Headquarters, XVIII Airborne Corps and Fort Bragg, reviewed the recommendation for discharge on 19 November 1974, and requested the command return a report of mental status evaluation with the proper endorsements.

n. On 26 November 1974, he underwent a Mental Status Evaluation (DA Form 3822-R) as requested by his command. The examiner found that the applicant met the physical retention standards prescribed in Army Regulation 40-501 (Standards of Medical Fitness). The examiner further determined that the applicant was mentally responsible, able to distinguish right from wrong, able to adhere to the right, and had the mental capacity to understand and participate in proceedings.

o. On 23 December 1974, the Commanding General, XVIII Airborne Corps Artillery, Fort Bragg, approved his separation by reason of conviction by civil court, directed he be issued an Undesirable Discharge Certificate, and ordered his reduction to private/E-1.

p. Special Orders Number 002, issued from HQ, 573d Personnel Service Company, Fort Bragg, reduced him to private/E-1 by reason of an undesirable discharge, effective 23 December 1974.

q. On 6 January 1975, he was discharged. His DD Form 214 shows he completed 1 year, 1 month, and 16 days of net active service this period. He was awarded the National Defense Service Medal. It further shows in:

(1) Item 9c (Authority and Reason) – Army Regulation 635-206, Section VI, Separation Program Designator: JKB.

(2) Item 9d (Effective Date) – 6 January 1975.

(3) Item 9e (Character of Service) – under other than honorable conditions.

(4) Item 10 (Reenlistment Code) – RE-4.

(5) Item 27 (Remarks) – 180 days time lost under Title 10, Section 972.

4. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

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 misconduct due to his civil conviction. He had been found guilty of the charge of larceny and breaking and entering and was sentenced to 5 years' probation. As a result, he was separated from active duty and received an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature, and that outweigh his misconduct, in support of a clemency determination. Based on a preponderance of evidence, the Board determined that 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 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 15-185 (Army Board for Correction of Military Records) 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.

3. Army Regulation 635-206 (Discharge – Misconduct – Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion), in effect at the time, 15 July 1966, established policy and prescribed procedures for the elimination of enlisted personnel for misconduct by reason of fraudulent entry into the service, conviction by civil court, and absence without leave or desertion. Section VI provided procedures for processing cases of individuals who, during their current term of active military service, have been initially convicted or adjudged juvenile offenders.

a. Paragraph 33a provided the conditions which subjected an individual to discharge when he had been initially convicted by civil authorities, or action taken against him which is tantamount to a finding of guilty, of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of 1 year.

b. Paragraph 36 provided an individual discharged for conviction by civil court normally will be furnished an undesirable discharge certificate except that an honorable or general discharge certificate may be furnished if the individual being discharged has been awarded a personal decoration, or if warranted by the particular circumstances in a given case.

c. Paragraph 37a provided the authority for discharge or retention. The convening authority is authorized to order discharge or direct retention in military service when disposition of an individual has been made by a domestic court of the United States or its territorial possessions. Upon determination that an individual is to be separated with an Undesirable Discharge, the convening authority will direct reduction to the lowest enlisted grade by the reduction authority under provisions of AR 600-200 (Enlisted Personnel Management System).

3. Army Regulation 635-200 (Personnel Separations) in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

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. Army Regulation 635-5-1, in effect on 20 May 1974, listed the specific authorities-regulatory, statutory, or other directives-and reasons for separation from active duty. The SPD JKD corresponded to the authority Army Regulation 635-206, Section VI and the narrative reason "Conviction by a civil court or adjudged as a juvenile offender."

5. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Chapter 3 prescribes basic eligibility for prior-service applicants for enlistment and includes a table of U.S. Army reentry eligibility (RE) codes.

- RE-1 applies to persons completing an initial term of active service who are considered qualified to reenter the U.S. Army if all other criteria are met
- RE-3 applies persons who are not considered fully qualified for reentry or continuous service at the time of separation, but disqualification is waivable
- RE-4 applies to persons separated from their last period of service with a nonwaivable disqualification

//NOTHING FOLLOWS//