

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 June 2024

DOCKET NUMBER: AR20230011932

APPLICANT REQUESTS:

a. Correction of his DD Form 214 (Certificate of Release or Discharge from Active duty for the period ending 1 November 2007 by:

- upgrading his discharge from under other than honorable conditions (UOTHC) to honorable
- changing his narrative reason for separation to secretarial authority

b. A personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Letter from the Edmunds Law Firm (Exhibit B)
- Notice of Representation and Authorization
- Military Brief in Support of Military Upgrade with List of Exhibits
- Exhibit A - DD form 214 and other Military Documents
- Exhibit C - Reference Letter Judge W- P-
- Exhibit D - Reference Letter J- S- III
- Exhibit E - Reference Letter Governor V- A-
- Exhibit F - Reference Letter Dr. G- I. R-
- Exhibit G - Letter of Reference B- J-
- Exhibit H - Letter of Reference B- O-
- Exhibit I - Letter of Reference Judge V- T-
- Exhibit J - Letter of Reference Major (MAJ) G- S-
- Exhibit K - Letter of Reference M- W-
- Exhibit L - Letter of Reference P- E-
- Exhibit M - Letter of Reference R- B-R-
- Exhibit N - Wildland Firefighter Certificate
- Exhibit O - Photos of Applicant as Wildland Firefighter
- Exhibit P - Certificate of Appreciation, 2011 Wallow Fire
- Exhibit Q - Community/Veteran Service, Code Talker T- B-

- Exhibit R - Community/Veteran Service M- T-
- Exhibit S - Employee Performance Evaluations 2020 through 2022
- Exhibit T - Resume
- Exhibit U - Transcript Coconino Community College
- Exhibit V - Transcript United Tribes Technical College
- Exhibit W - Transcript University of Arizona
- Exhibit X - Native American Pathway to Law
- Exhibit Y - Photo of Applicant in Uniform
- Exhibit Z - Photos of Applicant

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 defers to his attorney. Letter from [Name] Law Firm, 28 July 2023, advised the Board the applicant retained the law firm regarding his military discharge upgrade. A Notice of Representation and Authorization states the applicant authorized the Board to discuss issues relative to his case with his attorney. The Brief in Support of Military Upgrade, signed by the applicant and his attorney, states:
  - a. The applicant was the petitioner in the military matter. He had personal knowledge of the facts set forth in the brief. If he was called upon as a witness, he would testify competently thereto, except for those based upon information and belief, which are so stated. The applicant seeks modification of his military record, as the circumstances surrounding the incidents and the accompanying documentation provide strong support for an upgrade. He received an UOTHC discharge from the Army on 1 November 2007.
  - b. Despite a single act of indiscretion, he served honorably for three years and four months, demonstrating his unwavering dedication to the Army. As an outstanding member of the Armed Forces, he proved to be a valuable asset, with limitless potential to excel in his service to the country. His discharge from the Army was a result of a single act of indiscretion, where he made an uncharacteristically poor decision. Despite an otherwise unblemished record of service, this one mistake led to his dismissal.
  - c. During his three year and four month tenure in the Army, he demonstrated exemplary performance in fulfilling his duties, earning accolades for his exceptional service. He was a dedicated Soldier, actively engaged in his responsibilities and he consistently excelled in his performance. His commendable service was recognized with several awards, including National Defense Service Medal and Army Service Ribbon.

d. He deeply regrets and takes full responsibility for his involvement in the incident that led to him, and several other Soldiers, being accused of sexual assault against a fellow Soldier. He is also remorseful for not being forthright with authorities investigating the incident at first, though he did eventually cooperate with investigators. He fully understands that his actions were a violation of Army policy and the Uniform Code of Military Justice (UCMJ) and is genuinely sorry for his misconduct. He realizes the gravity of his mistake and how it could have negatively affected the reputation of the Army and how it indelibly affected the victim.

e. He acknowledges that even though his actions, during the assault, were not as egregious as those of the others involved, he knows his actions were not insignificant compared to those of the others and that they were unequivocally wrong. He fully acknowledges his responsibility for what he did and requests the Board consider his actions since the incident as a testament to his genuine remorse and earnest efforts to seek redemption in the ways in which he can.

f. He has publicly acknowledged his mistake and shown contrition for it. He has used the lessons he learned through his mistakes as an example to teach others in his community how to avoid making the same kinds of mistakes he made to help them lead successful careers serving the U.S. Military.

g. His discharge occurred sixteen years ago. Since that time, he has shown his dedication to his nation, his community, and his tribe, and he has demonstrated commitment to veterans' issues, notably Native American veterans. Despite the circumstances surrounding his discharge, it is inequitable to continue stigmatizing the applicant.

h. He acknowledges his mistakes and has received appropriate punishment from both society and the U.S. Army through his separation. He has also asked for, and received, the forgiveness of his family and community for his lamentable error in judgment. He has fulfilled the terms of the nonjudicial punishment for his offense and still faces the consequences to this day. He has proven his ability to learn from his mistakes and move forward in a positive manner. He fully accepts responsibility for his actions in the incident which ended his military career.

i. Following his discharge, he remained steadfast in his commitment to the values he cherished both before and after the incident. Taking fully responsibility for his actions, he has chosen to forge ahead and continue serving his nation, community, and fellow veterans. He has grown into an exemplary citizen of the U.S. He has excelled in his civilian career and has distinguished himself academically. He possesses no criminal record, remains free from involvement in drugs or alcohol abuse, and has had no negative encounters with law enforcement.

j. He believes that this single act of indiscretion, though serious, should not prevent him from receiving a discharge upgrade, especially in light of his dedication to redeeming himself, since his discharge. He remains committed to serving his country with honor and dedication and asks for the opportunity to continue to demonstrate his commitment to his country.

k. He joined the Army because of a lifelong dream and a family legacy of military service. His commitment to serving others continues, even after his separation from the Army, in no small part because of the lessons and values he learned in the Army. Two significant values he carries from his Army experience are maintaining a strong sense of service and practicing good character in all aspects of life. Despite having made a mistake, during his time in the Army, he remains determined to be respectful, empathetic, and perseverant, and to service to his nation, community, and fellow veterans to the best of his ability.

l. Since his discharge from the Army, he has undergone significant personal growth and has emerged as a compassionate individual. Engaging in various endeavors, he has served his community as a wildland firefighter and actively worked towards promoting the welfare of veterans. Additionally, he has demonstrated exceptional academic achievements and actively participated in community service and projects. By upholding community standards and fostering community pride he has made valuable contributions. The inclusion of numerous character statements further attests to his unwavering commitment to serving his nation, community, veterans, and family throughout his adult life.

m. With an unwavering commitment to serving his nation, tribe, Veterans, and community he earnestly seeks the opportunity to attend law school. This petition implores the Board to grant forgiveness for his past transgressions and upgrade his discharge, thus enabling him to utilize the GI Bill benefits. By doing so, he aims to pursue his aspiration of studying law and further contribute to his community in a more substantial capacity. He humbly requests forgiveness and understanding that while it cannot alter the past, it holds the power to shape the future.

n. He is fortunate to have a strong support network comprising of family, friends, and fellow veterans who stand by him, during this time. Additionally, he receives support from community and tribal leaders who endorse his endeavors. In return, he actively contributes to the welfare of veterans and strives to give back to those who have served.

o. Whole Person Concept - the review process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable military member. This is known as the whole person concept. All available, reliable information about the person,

past and present, favorable, and unfavorable, should be considered in reaching a military upgrade determination.

p. In consideration of the whole person concept, it is instructive to not only look at the recommendations of those who have witnessed his character and work performance first hand but also to see what his life is outside of the reasons for discharge. He has worked very hard throughout his life. He understands the obligations he subjects himself to. His long-term work ethic and dedication to serving his country are evidence of this.

q. The applicant is the third child of his parents and grew up in Holbrook, Arizona with a strong connection to the Navajo cultures and traditions. He learned the values of hard work and helping others from an early age, witnessing his father and mother's selfless service to their relatives on the Navajo Nation. Inspired by his family's legacy of military service, including his sister M-'s enlistment in the U.S. Army, he decided to serve his country.

r. In April 2004, he enlisted in the Army, during a time when the military was struggling to meet its recruitment goals. Many of his relatives had served in past wars, even before Native Americans gained citizenship in the U.S. He underwent training as a Wheeled Vehicle Mechanic and excelled in his class, earning recognition for his skills. Although a leg injury prevented him from completing Airborne School, he was assigned to Fort Drum, New York, where he maintained vehicles for the 10th Mountain Division.

s. His dedication to service extended beyond his military duties. He volunteered as part of the Honor Guard, performing military funerals for fallen Soldiers in Operation Enduring Freedom and Operation Iraqi Freedom. After his discharge, he enrolled at Pima Community College in Tucson, Arizona, while working as a street sweeper to support himself. Through a contact, he secured a position with the U.S. Forest Service in Montana as a Fuels Crew member, focusing on vegetation management and wildfire prevention.

t. In 2008, he moved to Killeen, Texas to help care for his nephew, while his sister worked for the Army. During this time, he worked for a catering service owned by an Army veteran, providing food for Army balls and other events. He seized the opportunity to further his education at Central Texas College, while maintaining his connection to the Forest Service.

u. His dedication to firefighting led him to join the Kaibab National Forest as a crewmember for 7-41 Fire Engine in Tusayan, Arizona, near the Grand Canyon National Park. He worked on wildfires throughout the western U.S. and continued his education at Coconino Community College, earning an Associate of Arts degree in General Studies.

v. With the support of his leaders at Tusayan Ranger District, he acquired higher certifications and took on leadership roles as a Wildland Firefighter. He also became involved with the Native American Student Association at the University of Arizona, organizing events for native American Heritage Month and collaborating with Navajo Code Talker T- B- for a special event.

w. After graduating with a major in Political Science from the University of Arizona, he faced difficulty finding employment. He worked as a roofer in Albuquerque, New Mexico before attending a Heavy Equipment Operator course at United Tribes Technical College in North Dakota. He returned to New Mexico and worked as a Court Clerk for Navajo Nation Courts, contributing to the administration of justice and organizing men's conferences to promote positive male role models.

x. In 2019, he became the Grants Coordinator for the Pueblo of Isleta Tribal Government in New Mexico. He ensured compliance with grant requirements, maintained relationships with granting agencies, and supported the Pueblo's Veterans Association in securing funding for office renovations and farm equipment. He also volunteered, during the COVID-19 pandemic, assisting with food distribution and providing essential supplies to tribal members.

y. His journey is a story of redemption and forgiveness. Despite facing challenges and setbacks, he found purpose in serving his nation, tribe, and community. Through his various roles, he demonstrated resilience, commitment, and a deep understanding of the importance of giving back. He has shown that redemption is possible through service and a willingness to learn and grow. The reasons for the discharge against him do not define who he is as a person, nor do they accurately represent the strong values he had continuously lived by. As such, there should be no doubt cast on him. The aforementioned reasons for discharge are not a threat to the U.S. military, nor do such reasons reflect negatively on the service. Therefore, he requests his discharge be upgraded.

z. Despite actively serving his country in the best way possible, he aspires to advance and excel in his role, but his current undesirable discharge prevents him from doing so. His deep love for this country and the Army fuels his respect, motivation, and devotion underlie his plea to be recognized as an honorably discharged member of the U.S. Army, as it holds immense significance in his life. Allowing him to undergo reevaluation and reconsideration by the Board would not prejudice the government. In the interest of justice, such a request for reconsideration is both appropriate and justified. He was not afforded a reasonable opportunity to mitigate or rectify his mistake or behavior; instead, he was subject to administrative separation. He appeals to the Board to carefully review his application and grant an upgrade of his discharge to honorable, along with a revision of his narrative reason for separation to secretarial authority. He believes that such a decision would align with fairness and justice.

4. The applicant's attorney, on behalf of the applicant, provides the following documents:

a. Exhibit C - Letter of Reference from Judge W- P-, 9 May 2023, who has known the applicant in a professional capacity for three years. The applicant displayed exemplary skill and dedication to his work. He attended men's conferences where he often spoke about his failures, while serving the U.S. Army and how he was not honorably discharged. He has always displayed candor in his conduct and holds the highest regard for his ethical duties in his work and behavior. He has suffered anguish over the choices he made, while serving the military, and has displayed open repentance, while teaching others not to follow in his footsteps. He has asked for atonement from his community and his family and feels the guilt over his discharge from the Army. He has made significant changes in his life that merit a review of his discharge record. The entire letter is available for the Board's review.

b. Exhibit D - Letter of Reference from J- S- III who was the commander of E Company, 1-58th Aviation Battalion, Air Traffic Services from December 2004 to April 2007. The applicant arrived shortly after J- S- III at the end of January 2005. The applicant demonstrated traits in keeping with the standards and traditions of the U.S. Army such as duty and loyalty. He was a hardworking Soldier and rose to the rank of specialist (SPC). The author had no recollection of any problems or disciplinary action toward the applicant. The applicant served his country faithfully and the author wholeheartedly believes he should be entitled to the same benefits that all veterans enjoy. The entire letter is available for the Board's review.

c. Exhibit E - Letter of Reference from Governor V- A-, who served as the Governor for the Pueblo of Isleta, a sovereign Native American Pueblo in New Mexico where he worked with the applicant. The applicant has been entrusted to provide assistance to all of the Tribal Programs that have grant funding ranging from thousands of dollars to multimillion dollar grants. The applicant tracks, logs, and maintains compliance with the terms and conditions of agreements with the grantor by adhering to established rules and regulation. He also maintains a positive relationship with all of the grantors. The applicant introduced the Governor to a Native American who fought in World War II and when he returned home from the war was not allowed to register to vote. The individual filed a lawsuit and a panel of three federal judges agreed that Native Americans in New Mexico were given the right to vote. In light of the information, the applicant was given the approval to move forward to celebrate M- T- Day on 3 August 2022. The applicant has proven his passion for serving a community, integrity to his position, and his honor of veterans of the U.S. The entire letter is available for the Board's review.

d. Exhibit F - Letter of Reference from Dr. G- I. R- who has known the applicant for a number of years. The author witnessed the applicant participate in a number of Veterans Education and Training Service sponsored activities and events including a

specific gathering to honor a World War II Navajo Code Talker, Mr. T- H. B-. The applicant eagerly volunteered for numerous social gatherings affiliated with the veterans community and Native American community. He is of sound character and has a great sense of ambition to continue helping others. His work experience has enhanced and cultivated his skills to continue building strong relationships with different institutions and organizations. He continues to serve Native American populations in and around Albuquerque, New Mexico. The author did not hesitate to recommend the applicant for an upgrade of his discharge from the U.S. Army. The entire letter is available for the Board's review.

e. Exhibit G - Letter of reference from B- J-, the Executive Director of the New Mexico Humanities Council a nonprofit organization that provides support to New Mexico's cultural institutions. It was through his work at the council that he came to know the applicant. It was because of the applicant that Pueblo of Isleta was able to commemorate the historical impact of M- T-. The applicant was the primary catalyst for making the watershed commemorative event known as M- T- Day happen. The author could speak to the applicant's work ethic, his care for his adopted community at the Pueblo of Isleta, his passion for Veterans issues, and his interest in making sure that significant but nearly forgotten New Mexicans receive the recognition they deserve. He has proven himself to be a positive and upstanding citizen. The entire letter is available for the Board's review.

f. Exhibit H - Letter of reference from B- O-, who worked for the Kaibab National Forest and supervised the applicant. The applicant was a key member of the Tusayan Ranger District Fire Program. He was always reliable in high risk fire management situations. He actively took on leadership roles to further the Tusayan Ranger District Fire Program and himself. He was a vital component of the Tusayan Fire Program. The entire letter is available for the Board's review.

g. Exhibit I - Letter of reference from Judge V- T-, who recently retired as Chief Judge for the Pueblo of Isleta where the applicant was employed in the Office of Contracts and Grants. The applicant proved himself to be a very motivated, task oriented employee. The judge has never been disappointed in the applicant's assistance in monitoring contract reporting deadlines and orchestrating the multiple contract/grant requirements for the over fifty plus tribal departments and three branches of government. He is very respectful, articulate, intelligent, and just a genuinely nice person. The author respectfully asked the Board to take into consideration the many strides forward the applicant has accomplished and positive action he has taken to improve his life skills. The entire letter is available for the Board's review.

h. Exhibit J- Letter of reference from MAJ G- S- , who served with the applicant from July 2005 until December 2005 as his squad leader. The author knew the applicant to be loyal, hardworking, humble, and patriotic. He believed in the value of his service to



his country and his fellow Soldiers. He had the author's trust, support, and strongest recommendation. The entire letter is available for the Board's review.

i. Exhibit K- Letter of reference from M- W-, the applicant's sister, who is the eldest of five siblings and 10 years senior to the applicant. He decided to join the military. Enlisting was important to him as he always respected the military and their family members that also served in the military. She knows the applicant made a mistake in his military career. She also knows he is remorseful by making amends and continues to do the good deeds he has been doing. This one incident did not send him down the wrong path. She admires how his motivation and resilience did not let one mark on his life discourage him to give up. Instead he persevered by working hard, and he continues to be a public servant of the people as a tribal government employee with the Navajo Nation and Pueblo of Isleta. She asks the Board to find his testament a demonstration of his will and pursuing his dreams despite a setback. He deserves an upgrade because he cares and teaches the same values he has. He is a respected citizen and leader. He still proudly contributes to his community and our country. The entire letter is available for the Board's review.

j. Exhibit L - Letter of reference from P- E-, who has worked with the applicant for over three years and is the Tribal Treasurer for the Pueblo of Isleta. The applicant has always conducted himself with integrity and shown a good work ethic. During COVID-19, he assisted with putting together food boxes. There have been times when he was the only employee within the Grants department and kept it running smoothly and met deadlines. It speaks to the person he has become to undertake this process to have his discharge reviewed for possible reclassification. The entire letter is available for the Board's review.

k. Exhibit M - Letter or reference from R- B-R-, who is a court administrator for the Navajo Nation Judicial Branch, and the applicant's direct supervisor when he worked at the To'Hajiilee court . He planned and organized a men's wellness conference an inaugural event. He worked with their Peacemaking Traditional Specialists in To'Hajiilee and Alamo Navajo communities in the planning and implementation of the conference. There was never a time when he demonstrated any faults in ethics, morals, and standards. The author fully supported his request for an upgrade of his discharge. The entire letter is available for the Board's review.

l. Exhibit S - Performance Evaluation Reports as the Contracts and Grants Coordinator, from 2020 through 2022, which show the applicant's job duties, his personal performance, personal improvements, and ratings for each area. The evaluations are available for the Board's review.

m. Exhibit T - The applicant's resume, which shows his skills, education, experience, and references. The entire resume is available for the Board's review.

n. Exhibits U, V, and W - transcripts from Coconino Community College, United Tribes Technical College, and University of Arizona. The transcripts are available for the Board's review.

o. Exhibit X - Native American Pathway to Law shows he had been accepted to participate in the Native American Pathway to Law's Pre-Law Session. The entire document is available for the Board's review.

5. The applicant's service record contains the following documents:

a. The applicant enlisted in the Regular Army and entered active duty on 16 June 2004. His Enlisted Record Brief, 11 April 2007, shows the applicant was assigned to Fort Drum, New York and attained the rank of SPC with a date of rank of 10 May 2006.

b. DD Form 458 (Charge Sheet), 17 May 2007, shows the applicant's commander preferred the following charges against the applicant, in the rank of SPC:

(1) On or about 16 March 2007, conspire with SPC J- M. D- and private/E-2 (PV2) L- D. O- to commit offenses under the UCMJ to wit: rape, forcible sodomy, and indecent assault of PV2 E- T. T- and in order to effect the object of the conspiracy the applicant placed his mouth on the breast of PV2 E- T. T-.

(2) On or about 21 March 2007, with intent to deceive, the applicant made an official statement to wit: he did not socialize with PV2 E- T. T-, SPC J- D. D-, or PV2 L- D. O- on the night of 16 March 2007, which statement was totally false and was then known by the applicant to be so false.

(3) On or about 16 March 2007, the applicant did rape PV2 E- T. T-.

(4) On or about 16 March 2007, the applicant committed anal sodomy with PV2 E- T. T- by force and without the consent of the said PV2 E- T. T-.

(5) On or about 16 March 2007, the applicant committed oral sodomy with PV2 E- T. T- by force and with the consent of the said PV2 E- T. T-.

(6) On or about 16 March 2007, the applicant committed an indecent assault upon PV2 E- T. T-, a person not his wife, by putting his mouth on her breast, with intent to gratify his sexual desires.

c. The applicant's chain of command recommended he be tried by general court-martial. A DD Form 457 (Investigating Officer's (IO) Report), 7 August 2007, shows the final IO recommendation: After reviewing all of the available evidence the IO concludes

that the government should continue with the charges and specifications as outlined on the DD Form 458. Furthermore, after taking into account all matters in extenuation and mitigation, to include the age of the victim, the conspiracy involving three more experienced Soldiers who took advantage of a "friend", the sexual nature of the crimes, and the belief that the victim was "roofied", it was the IO's opinion that the charges be referred to a general court-martial for adjudication. The entire IO investigation packet is available for the Board's review.

d. On 21 August 2007, the Convening Authority, referred the charges against the applicant to a general court-martial.

e. On 4 October 2007, the applicant voluntarily requested discharge in lieu of trial by court-martial under Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 10. The applicant understood he may request discharge in lieu of trial by court-martial because charges were preferred against him under the UCMJ, one of which or a combination of which authorized the imposition of a bad-conduct or dishonorable discharge. He was making the request of his own free will and had not been subjected to any coercion. He had been advised of the implications of his request for discharge and acknowledged he understood the elements of the offenses against him and was guilty of one or more of the charges or of lesser included offenses therein. Under no circumstances did he desire further rehabilitation. He had been afforded the opportunity to consult with appointed counsel and had been fully advised of the nature of his rights under the UCMJ. He had been advised he could receive an UOTHC discharge and the results of the issuance of such a discharge.

f. On 26 October 2007, the Convening Authority, approved the applicant's request for discharge in lieu of trial by court-martial, reduced the applicant to the rank of private/E-1 in accordance with paragraph 1-13 of AR 635-200, and issued him an UOTHC discharge. On the same day, the Convening Authority withdrew and dismissed the charges against him without prejudice.

g. On 1 November 2007, he was discharged accordingly. His DD Form 214 shows he had completed 3 years, 4 months, and 16 days of active duty service. He was discharged under the provisions of Chapter 10, AR 635-200 in lieu of trial by court-martial. His character of service was UOTHC, his separation code was KFS, and his reentry code was 4. He was awarded or authorized the National Defense Service Medal and Army Service Ribbon.

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 partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. Discharge Upgrade: Grant to General. The applicant was charged with commission of an offense (conspiracy to commit rape, forcible sodomy, and indecent assault; false official statement; rape; anal and oral sodomy; and indecent assault), punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. However, the applicant provided multiple letters of reference in support of a clemency determination. The Board thoroughly reviewed his submission and determined that in view of his misconduct, his service did not rise to the level required for an honorable characterization; however, a given his length of service, expression of remorse, letters of support, and overall post discharge accomplishments, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests.

b. Reason for Separation: Deny. The applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 10 of AR 635-200. He was charged with offenses punishable under the UCMJ with a punitive discharge via a court-martial, and he voluntarily requested a discharge in lieu of trial by a court-martial. Absent his UCMJ violations, there was no reason to prefer court-martial charges against him. The Board noted that the underlying reason for his separation is his request to be discharge instead of being tried by a court-martial. The only valid narrative reason under chapter 10 of AR 635-200 is in lieu of trial by court-martial which is correctly listed on his DD Form 214.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

█           █           █           GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

:            :            :            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 1 November 2007 to show his Character of Service: Under Honorable Conditions (General).

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading his discharge to honorable or changing the Narrative Reason for Separation.

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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 (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 that 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.

3. AR 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets 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. Readiness is promoted by maintaining high standards of conduct and performance.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

c. 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 separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to AD.

d. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

e. Chapter 5 establishes policy and prescribes procedures for separating members for Secretarial authority convenience of the government. Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used

when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

f. A Soldier who requests discharge as prescribed in chapter 10 may be discharged under other than honorable conditions if he/she has been afforded the opportunity (not less than 72 hours) to consult with a consulting counsel.

(1) The Soldier must certify in writing that he/she understands that he/she may receive a discharge under other than honorable conditions.

(2) The Soldier must understand the adverse nature and possible consequences of such a discharge.

(3) The Soldier must personally sign a request for discharge. A conditional request is not permitted.

(4) The consulting counsel will sign as a witness, indicating that he/she is a commissioned officer of The Judge Advocate General's Corps. A Soldier may waive consultation with a consulting counsel. Counsel will prepare a statement to this effect that will be attached to the file; the Soldier will state that the right to counsel has been waived.

g. A Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial.

4. AR 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code KFS is used for discharge In Lieu of Trial by Court-Martial.

5. AR 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

6. Published guidance to the BCM/NRs clearly indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

7. 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//