

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230012885

APPLICANT REQUESTS:

- Upgrade his bad conduct discharge to an honorable character of service
- A personal appearance before the Board, via video/telephone

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10 (Armed Forces), U.S. 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, in effect, while he was stationed in Germany, he took leave to his home in [REDACTED] he missed his return flight, and when he contacted his company commander, the commander told him to turn himself in at the closest military base. The applicant went to [REDACTED] but they did not allow him to enter the base, telling him he was no longer in the military. He made several more unsuccessful attempts to surrender himself at other military bases until, finally after a year, a local sheriff picked him up and transported him to [REDACTED]

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

a. On 14 September 1977, after obtaining his parents' permission, the applicant enlisted into the [REDACTED] Army National Guard ([REDACTED] ARNG); he was 17 years old. On 6 January 1978, he entered initial active duty for training and, on 20 April 1978, after being awarded military occupational specialty 11B (Infantryman), orders honorably released the applicant and transferred him back to his [REDACTED] ARNG unit. His DD Form 214 (Report of Separation from Active Duty) shows he completed 3 months and 15 days of net active duty.

b. Effective 6 July 1978, the applicant's chain of command promoted him to private (PV2)/E-2. On 30 January 1979, the applicant's ■■■ ARNG commander recommended the applicant be ordered to active duty after accumulating 6 absences within a 1-year period. On 26 April 1979, Headquarters, Sixth U.S. Army orders directed the applicant report, on 19 June 1979, to the U.S. Army Reception Station at Fort Leonard Wood for a 20-month and 1 day term of active duty (i.e., 1 year, 8 months, and 1 day); the orders showed the applicant entered active duty as a member of the U.S. Army Reserve and would be to further assigned to Germany.

c. On 18 June 1979, the ■■■ ARNG separated the applicant with a general discharge under honorable conditions; as its authority, the ■■■ ARNG cited paragraph 7-10e (Discharge from the ARNG of the State Only for Enlisted Personnel with a Remaining Reserve Obligation – Order to Active Duty for Unsatisfactory Participation), National Guard Regulation 600-200 (Enlisted Personnel Management). His National Guard Bureau Form 22 (Report of Separation and Record of Service) indicated the applicant had completed 1 year, 9 months, and 5 days of ■■■ ARNG service.

d. On 4 July 1979, after first reporting to Fort Leonard Wood, the applicant arrived in Germany and orders further assigned him to an infantry battalion; he arrived at his unit, on 10 July 1979.

e. On 11 April 1980, the applicant enlisted in the Regular Army for 3 years. On 16 May 1980, the applicant's unit reported him as absent without leave (AWOL) and dropped him from unit rolls on 25 June 1980. On 13 January 1981, after a 242-day absence, the applicant returned to military control and orders immediately transferred him to the U.S. Army Personnel Control Facility (PCF) on Fort Carson, CO.

f. On 9 February 1981, the applicant left the Fort Carson PCF in an AWOL status and, on 13 March 1981, the PCF dropped the applicant from its rolls. On 8 November 1981, the applicant returned to military control at Fort Carson but went AWOL again, on 30 November 1981; the PCF dropped him from unit rolls the same date. On 29 January 1981, the applicant returned to military control at Fort Carson, but, on 8 February 1982, he left again in an AWOL status. On 26 April 1982, the applicant returned to military control.

g. On 18 June 1982, a special court-martial empowered to adjudge a bad conduct discharge convicted the applicant of violating Article 86 (AWOL), Uniform Code of Military Justice (UCMJ).

(1) The applicant pleaded guilty to three specifications of Article 86; the court found the applicant guilty of two periods of AWOL, listed below, but dismissed the third period, from 8 February to 26 April 1982 (77 days):

- 9 February to 8 November 1981 (272 days)
- 20 November 1981 to 29 January 1982 (60 days)

(2) The court sentenced the applicant to 130-days' confinement, forfeiture of \$300 per month for five months, reduction to private (PV1)/E-1, and a bad conduct discharge. The court immediately remanded the applicant to confinement.

(3) On 26 August 1982, the special court-martial convening authority approved the sentence but directed the suspension of so much of the sentence pertaining to confinement and forfeitures that exceeded confinement for 3-months and forfeiture of \$300 per month for three months. Except for the bad conduct discharge, the convening authority ordered the sentence's execution.

h. On 2 September 1982, following the applicant's release from confinement, the Fort Carson PCF placed the applicant on indefinite excess leave, and he departed Fort Carson that same date.

i. On 2 November 1982, the U.S. Army Court of Military Review affirmed the findings of guilty and the sentence in the applicant's case. A Special Court-Martial Order, dated 9 February 1983, ordered the execution of the applicant's bad conduct discharge. On 23 February 1983, orders discharged the applicant accordingly. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 8 months, and 18 days of his 20-month and 1 day term of obligated active duty service. The report additionally reflected the following:

(1) Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon and a marksmanship qualification badge.

(2) Special Additional Information:

- Item 25 (Separation Authority) – Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3 (Character of Service/Description of Separation), Section IV (Dishonorable and Bad Conduct Discharge)
- Item 26 (Separation Code (SPD)) – "JJD"
- Item 27 (Reenlistment (RE) Code) – RE-4
- Item 28 (Narrative Reason for Separation) – "As a Result of Court-Martial, Other"

4. Per AR 15-185 (ABCMR), an applicant is not entitled to a hearing before the Board; however, a panel of the Board or by the Director of ABCMR may authorize a request for a hearing.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Per Title 10, USC, section 1552, the ABCMR is not empowered to set aside a conviction. Rather, the law only authorizes the Board to change the severity of the sentence imposed in the court-martial process, and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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 no evidence of post-service achievements or 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:

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.

12/19/2024

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:

a. 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.

b. With respect to courts-martial, and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, corrections of any military records of the Secretary's Department may extend only to those actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

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

a. Paragraph 3-7a (Honorable Discharge) stated an honorable discharge was a separation with honor. The honorable characterization was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and duty performance.

b. 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.

c. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate)). A member could be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence ordered duly executed.

d. Paragraph 5-3 (Secretarial Authority). The separation of enlisted personnel was the prerogative of the Secretary of the Army and was to be based on the Secretary's determination that separation was in the best interests of the Army. Soldiers being separated for the convenience of the Government could receive a character of service of honorable; under honorable conditions; or uncharacterized, if in entry-level status.

3. AR 600-200 (Enlisted Personnel Management System), in effect at the time, prescribed policies and procedures for enlisted promotions and reductions. Paragraph 8-3d (1) (Misconduct – By Operation of Law – General Rule). A court-martial sentence of an enlisted member which, as approved by the convening authority, included a punitive discharge, confinement, or hard labor without confinement, carried a reduction to the lowest enlisted pay grade. The reduction was effective on date of approval by the convening authority.

4. 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). As to entries for item 27 (Reenlistment Code), the regulation referred preparers to AR 601-280 (Army Reenlistment Program).

5. AR 635-5-1, in effect at the time, stated Soldiers separated in accordance with chapter 3, section IV, AR 635-200, were to receive an SPD of "JJD" and have, "As a Result of Court-Martial, Other" entered in item 28 of their DD Form 214.

6. AR 601-280, in effect at the time, stated the following:

a. Paragraph 2-22f (Waivable Disqualification – Summary, Special, or General Courts-Martial) stated personnel with a conviction of one or more summary, special or general courts-martial had to obtain waiver from the Commanding General, U.S. Army Military Personnel Center in order to reenlist, but no action could be taken until the person's appellate process was complete.

b. Paragraph 22-24 (Nonwaivable Disqualifications). Applicants to whom the following disqualification(s) apply are ineligible for Regular Army reenlistment at any time and requests for waiver or exception to policy will not be submitted. Appropriate copies of DD Forms 214 will be coded RE-4. Such persons are not eligible to apply for

Regular Army enlistment under the provisions of AR 601-210 (Regular Army and Army Reserve Enlistment Program) at a later date:

- Insane persons
- Persons having a history of psychotic disorders
- Persons of questionable moral character, history of antisocial behavior, sexual perversion, or having frequent difficulties with law enforcement agencies
- Persons being processed for separation for misconduct or unsuitability with 18 or more years' service completed
- Persons barred from reenlistment by Department of the Army
- Persons currently serving as Army commissioned or warrant officers who were separated and did not have Regular Army enlisted service prior to entering active duty as a commissioned or warrant officer
- Persons whose reenlistment would be clearly inconsistent with the interests of national security
- Persons being separated under the Military Personnel Security Program
- Persons separated due to physical disability and reversion to inactive status for the purpose of retirement
- Persons separated due to physical disability that resulted from intentional misconduct or willful neglect during a period of AWOL
- Persons discharged for homosexual acts or tendencies
- Persons separated as aliens without legal U.S. residence
- Persons retired after 20, but less than 30 years
- Persons retired in lieu of discharge due to homosexuality
- Persons whose appropriate copies of DD Forms 214 will be coded RE-4 upon separation
- Persons receiving severance pay for reasons other than physical disability

c. Appendix D (Reenlistment Eligibility Codes) stated:

- RE-1 – qualified for reentry into the Army
- RE-3 – not qualified for reentry into the Army, but disqualification is waivable
- RE-4 – not qualified for reentry into the Army due to nonwaivable disqualification

7. AR 15-185, currently in effect, states:

a. The ABCMR decides cases on the evidence of record; it is not an investigative body. Additionally, the ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the

contrary). The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

b. An applicant is not entitled to a hearing before the Board; however, a panel of the Board or by the Director of ABCMR may authorize a request for a hearing.

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//