

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 June 2024

DOCKET NUMBER: AR20230013171

APPLICANT REQUESTS: Reconsideration of his previous request for an upgrade of his under conditions other than honorable discharge. Additionally, he requests a personal appearance via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings, denial, 24 June 2014
- DA Form 20 (Enlisted Qualification Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) period ending 29 July 1971
- Congress of the United States, House of Representative Inquiry response to applicant, 24 July 2013, and 30 July 2013
- Congressional Inquiry Division response to Congress, 25 July 2013

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 AR20130018259 on 24 June 2014.

2. As new argument, the applicant states he would like his discharge upgraded to receive benefits from the Department of Veterans Affairs (VA). He served in Vietnam and has been a model citizen with no trouble with law enforcement. He owns his own business, and he supports the community. He never married but had custody and raised his daughter since 1976.

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

a. He enlisted into the Regular Army on 16 January 1969. He held military occupational specialty 63B20 (Wheeled Vehicle Mechanic).

b. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 22 September 1969, at Fort Lee, VA, for unlawfully entering the unit mess hall, the property of the U.S. Government, on or about 20 September 1969, his punishment included reduction to E-2

c. His DA Form 20 (Enlisted Qualification Record) shows in item 31 he served in Vietnam from 15 January 1970 to 2 January 1971.

d. His DA Form 20 – (Appointments and Reductions) shows in item 33 (Appointments and Reductions):

- private (PVT)/E-1 (P): 16 January 1969
- private (PV2)/E-2 (P): 16 May 1969
- private first class (PFC)/E-3: 18 January 1970
- specialist (SPC)/E-4: 10 February 1970
- PV2/E-2: 26 December 1970

e. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 24 December 1970, in Vietnam, for:

- operating a vehicle in a reckless manner by following too closely, thereby causing an accident on 1 November 1970
- violating a lawful general regulation by being in an unauthorized location on or about 11 November 1970
- wrongfully having in his possession 2.4 grams of marijuana on or about 11 November 1970, his punishment included reduction to E-2

4. The applicant was arrested and confined on 18 March 1971 by civil authorities for sale and possession of heroin. He was released to military control on 25 April 1971 pending his hearing in district court.

5. On 18 May 1971 the applicant was tried and convicted of his offense, sale and possession of heroin, and sentenced to five years of confinement at [REDACTED].

6. On 24 May 1971, the applicant's unit commander advised him that he intended to recommend him for discharge under the provision of AR 635-206 (Personnel Separations — Discharge — Misconduct, Fraudulent Entry, Conviction by Civil Court, Absence without Leave, Desertion) by reason of conviction and sentence by a civil court.

7. On 7 June 1971 20 April 1972, the applicant consulted with legal counsel and acknowledged receipt of the commander's proposed separation memorandum.

Additionally, he stated he had been advised by counsel and acknowledged his understanding that he could be discharged under the provisions of Army Regulation 635-206, based on his conviction by a civilian court, and potentially would not be awarded an honorable discharge. He stated he did not intend to appeal his conviction and waived his rights and elected not to submit statements in his own behalf.

8. DA Forms 2823 (Sworn Statement) from two service members dated 16 June 1971 note that the applicant was new to the unit, he did his job but was quiet. He kept to himself and only had friends from another unit.

9. On 23 June 1971, the applicant's commander formally recommended his separation from service, under the provisions of Army Regulation 635-206, based on his conviction by a civil court and his below standard performance. On 28 June 1971, his intermediate commander endorsed the recommendation.

10. The separation authority approved his separation on 17 July 1971 and directed the applicant's discharge, under the provisions of Army Regulation 635-206. He also directed the applicant's issuance of a DD Form 258A (Undesirable Discharge Certificate).

11. On 29 July 1971, the applicant was discharged under the provisions of Army Regulation 635-206. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 2 years, 2 months, and 22 days of active-duty service. It also shows in

- item 13a (Character of Service): under conditions other than honorable
- item 25 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized): National Defense Service Medal, Vietnam Service Medal, Vietnam Campaign Medal,
- item 26a (Non-Pay Periods Time Lost)
 - 18 March 1971 — 25 April 1971
 - 17 May 1971 — 29 July 1971

12. The ABCMR considered the applicants petition for an upgrade of his discharge. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice and denied his request for relief.

13. The applicant provided argument and/or evidence the Board should consider, along with the applicant's overall record, in accordance with the published equity, injustice, or clemency determination guidance.

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

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| : | : | : | 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 AR20130018259 on 24 June 2014.

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| CHAIRPERSON | |
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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 635-200 (Personnel Separations – Enlisted Personnel), in effect at that time, set forth the basic authority for the separation of enlisted personnel.

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.

3. Army Regulation 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct (fraudulent entry, conviction by civil court, and absence without leave or desertion). That regulation provided for the elimination of enlisted personnel for misconduct when they were initially convicted by civil authorities, or when action was taken against them which was tantamount to a finding of guilty, for an offense for which the maximum penalty under the Uniform Code of Military Justice (UCMJ) was death or confinement in excess of one year. An undesirable discharge was normally considered appropriate.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Service Boards for Correction of Military/Naval Records (BCM/NR) 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.

5. 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 has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

//NOTHING FOLLOWS//