

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230013216

APPLICANT REQUESTS: Reconsideration of his prior request to upgrade his under other than honorable conditions (UOTHC) discharge to an honorable discharge and restoration of his grade of E-4.

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 AR20120011132 on 8 January 2013.
2. The applicant states he is a war Veteran and would like to receive Department of Veterans Affairs benefits. It has been 30 years since the incident that occurred off post that led to his discharge and he feels it is time to receive the upgrade. He believes the punishment was excessive.
3. The applicant enlisted in the in the Regular Army (RA) on 6 September 1990 for a period of 2 years and 21 weeks. He completed training with award of military occupational specialty 77W (Water Treatment Specialist).
4. He was promoted to specialist/pay grade E-4 on 1 May 1992 and reenlisted in the RA on 30 October 1992 for a period of 2 years. On 18 February 1993, he extended his 2-year reenlistment in the RA to a period of 3 years and 9 months.
5. The applicant served in Saudi Arabia rom 26 January 1991 through 25 July 1991.
6. A Honolulu Police Report and Investigation shows the applicant assaulted the female manager of an apartment complex on 8 September 1993. He was arrested on 14 September 1993 on the charge of burglary, attempted sexual assault, and kidnapping.

7. An 11 October 1993 police report was referred to the Prosecuting Attorney shows the charges of kidnapping, attempted sexual assault in the first degree and burglary in the first degree. Bail was set at \$50,000.00 on the kidnapping charge.

8. The applicant was found guilty in accordance with his plea on 22 March 1994 and sentenced to 9 months incarceration to end on 14 June 1994

9. A DA Form 3822-R (Report of Mental Status Evaluation), dated 13 September 1994, shows the applicant had no abnormalities in behavior, level of orientation, mood, thinking process, thought content, or memory. He was determined to be mentally capable to understand and participate in the proceedings deemed appropriate by command.

10. On 20 September 1994, the applicant's company commander notified the applicant that he was recommending him for separation under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), chapter 14 (Misconduct), based on his conviction by civil court on 16 May 1994. The applicant was advised of his rights and the separation procedures involved.

11. The applicant consulted with legal counsel and was advised of the rights available to him.

a. He was advised he may expect to encounter substantial prejudice in civilian life in the event a general discharge under honorable conditions discharge was issued to him.

b. The applicant acknowledged he understood that if he received a discharge certificate/character of service which was less than honorable, he could make application to the Army Discharge Review Board (ADRB) or the ABCMR for upgrading; however, an act of consideration by either board did not imply that his discharge would be upgraded.

c. He waived consideration of his case by a board of officers contingent upon receiving nothing less than an under honorable conditions (general) discharge.

d. He also indicated that if the separation authority refused to accept his conditional waiver, he requested consideration of his case before an administrative separation board, personal appearance before the board, and representation by counsel.

12. On 8 November 1994, the separation authority disapproved the applicant's request for conditional waiver and referred his case to an administrative separation board.

13. On 6 December 1994, the applicant was notified that a board of officers had been appointed to determine if he should be discharged. He was advised of his rights, including his right to representation by counsel.

14. On 29 December 1994, a board of officers convened to determine if the applicant should be discharged from the U.S. Army due to misconduct based on conviction by civil court.

a. The Summarized Record of Proceedings shows the applicant was represented by counsel and that the applicant testified in his own behalf. Two noncommissioned officers and two enlisted Soldiers from his unit also testified before the board.

b. The board of officers found by a preponderance of the evidence that the applicant did commit misconduct based on a civil conviction for kidnapping by the First Circuit Court of the State of Hawaii. The board recommended the applicant be discharged from the U.S. Army with an under other than honorable conditions discharge.

15. The applicant's chain of command concurred with the board's findings and recommended approval with an under other than honorable conditions discharge.

16. On 30 January 1995, the separation authority approved the board's recommendation for discharge of the applicant and directed the applicant be discharged under the provisions of Army Regulation 635-200, chapter 14, paragraph 14-5a, for misconduct with an under other than honorable conditions discharge, Separation Code JKB and Reentry Code 3.

17. The applicant's DA Form 2-1 (Personnel Qualification Record) lists the applicant's awards as the Army Commendation Medal, National Defense Service Medal, Army Service Ribbon, Southwest Asia Service Ribbon with 2 bronze service stars, Kuwait Service Medal, Overseas Service Ribbon, and the Marksman Qualification Badge with Rifle and Grenade Bars.

19. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 24 February 1995 for misconduct with an under other than honorable conditions discharge in the grade of E-1.

a. He completed 4 years, 5 months, and 19 days of net active service.

b. His narrative reason for separation is Misconduct.

c. Item 18 (Remarks) shows (in part), "Immediate Reenlistments This Period 19921030-19950224." It does not show the period of his continuous honorable active service.

e. His awards are listed as the National Defense Service Medal, Army Service Ribbon, South-West Asia Service Ribbon with 2 bronze service stars, Kuwait Liberation Medal, Overseas Service Ribbon, and the Marksman Qualification Badge with Rifle Bar.

20. On 8 January 2013, the ABCMR denied the applicant's requests for an upgrade of his discharge and restoration of his rank but administratively added at item 18 (Remarks) "CONTINUOUS HONORABLE ACTIVE SERVICE FROM 19900906 UNTIL 19921029." A DD Form 215 (Correction to the DD Form 214) was issued at that time.

21. In the processing of this case the U.S. Army Criminal Investigation Division (CID), searched their criminal file indexes, which revealed a CID Report pertaining to the applicant and provided a partial copy of the kidnapping investigation and findings.

22. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not 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: Deny. The evidence of record shows the applicant was convicted by a civil court of the charges of kidnapping, attempted sexual assault in the first degree and burglary in the first degree. He was sentenced to 9 months incarceration. As a result, his chain of command initiated separation action against him due to his civil conviction. An administrative separation board found by a preponderance of the evidence that the applicant did commit misconduct based on a civil conviction and recommended his discharge with an under other than honorable conditions discharge. The convening/separation authority approved it. 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.

b. Grade: Deny. The Board noted that by regulation, when a soldier is to be discharged under other than honorable conditions, the separation authority will direct an

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

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:	:	:	GRANT FULL RELIEF
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■	■	■	DENY APPLICATION

Except for the correction addressed in Administrative Note(s) below, 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 to amend the decision of the ABCMR set forth in Docket Number AR20120011132 on 8 January 2013.

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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's record shows his DD Form 214, for the period ending 24 February 1995 is missing entries that do not require Board action. As a result, amend the DD Form 214 by:

- a. Deleting the Kuwait Liberation Medal and the Marksman Marksmanship Qualification Badge with Rifle Bar from item 13 (Decoration, Medals, Badges, Citations, and Campaign Ribbons); and,
- b. Adding the following entries to item 13, the Army Commendation Medal, Kuwait Liberation Medal - Saudi Arabia, Kuwait Liberation Medal - Kuwait, and the Marksman Qualification Badge with Rifle and Grenade Bars.

REFERENCES:

1. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR if the decision has not previously been reconsidered. The applicant must provide new evidence or argument that was not considered at the time of the ABCMR's prior consideration.
2. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
  - 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

d. Paragraph 14–5 (Conviction by Civil Court) provides that a Soldier may be discharged when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the following conditions is present:

(1) A punitive discharge authorized for the same or a closely related offense under the Manual for Court-Martials, as amended.

(2) The sentence by civil authorities includes confinement for six months or more, without regard to suspension or probation.

3. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//