

IN THE CASE OF: ██████████

BOARD DATE: 8 August 2024

DOCKET NUMBER: AR20230014298

APPLICANT REQUESTS: reconsideration of his previous request to upgrade his bad conduct discharge to a general, under honorable conditions discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Statement

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 Dockets Number:

- AC93-07409, dated 8 September 1993
- AR20190004604 on 2 July 2019

2. The applicant states he joined the Army at an early age (17 years) in an effort to take of his parents who were struggling. Following training, he was assigned to Scofield Barracks, HI where bad influence habits began; he started drinking and missing formation, believing he was not fit for the Army. He had asked for a hardship discharge because he was the oldest son in his family and was supposed to take care of his parents; he was court-martialed and separated out of the Retraining Brigade at Fort Riley, KS. He is now older; he realizes he made mistakes back then, but he now needs help, particularly for health purposes

3. The applicant enlisted in the Regular Army on 7 October 1976. He completed basic combat and advanced individual training and was awarded military occupational specialty 11B10 (Infantryman). The highest grade he attained was specialist/E-4.

4. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on at least six separate occasions between June 1977 and February 1979. The various DA Forms 2627 (Record of Proceedings Under Article 15, UCMJ) show he accepted NJP as follows:

- 4 June 1977, failure to report to his appointed place of duty at the prescribed time
 - 24 August 1977, failing to go to his appointed place of duty and being absent from duty; his punishment included reduction from E-2 to E-1 (suspended)
 - 8 December 1978, being absent without leave (AWOL) from 27 November to 4 December 1978; his punishment included reduction from E-4 to E-3
 - 6 February 1979, being AWOL from 1 to 5 February 1979; his punishment included reduction from E-3 to E-2
 - 18 April 1979, being AWOL from 13 to 15 April 1979,
 - 10 May 1979, failing to obey a lawful order on three separate occasions
5. On 7 March 1979, before a summary court-martial that convened at Schofield Barracks, HI, the applicant was convicted of two specifications of AWOL from 14 to 21 February and from 23 February to 6 March 1979. The court sentenced him to be reduced to the grade of Private E-1 and confinement at hard labor for 30 days.
6. By authority of Orders 71-75, Headquarters, 25th Inf Div, Schofield Barracks, HI, 12 March 1979, the applicant was assigned to the U.S. Army Retraining Brigade, Fort Riley, KS, reporting on 29 March 1979.
7. A Commander's Inquiry, dated 20 June 1979, reports that the applicant was transferred to the 6th Unit, 3rd Battalion, U.S. Army Retraining Brigade, at Fort Riley, KS, and on 15 May 1979, separation proceedings were initiated based on his failure to successfully complete training. The applicant went AWOL seven days later.
8. On 22 May 1979, the applicant was reported as AWOL from 6th Unit, and on 19 June 1979, at 1800 hours, he was dropped from the Army rolls as a deserter.
9. On 2 November 1979, the applicant was convicted by a special court-martial of one specification of being AWOL from 22 May to 19 September 1979. The court sentenced him to a bad conduct discharge, a forfeiture of \$250 pay per month for 3 months, and confinement at hard labor for 3 months. The convening authority approved the sentence and forwarded the record trial to the appellate authority.
10. On 20 February 1980, the U.S. Army Court of Military Review affirmed the finding of guilty and the sentence. The applicant did not petition the U.S. Court of Military Appeals for a grant of review.
11. The available record does not contain a copy of the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty). It contains a National Archives (NA) Form 13038 (Certification of Military Service), dated 3 March 2010, that shows the applicant served from 7 October 1976 through 12 June 1980, and his service was terminated by a bad conduct discharge.

12. On 8 September 1993, the Board denied his petition for an upgrade of his discharge. The Board stated the alleged error or injustice was, or with reasonable diligence should have been discovered on 12 June 1980, the date the applicant was discharged. The time for the applicant to file a request for correction of any error or injustice expired on 12 June 1983. The application is dated 22 August 1992, and the applicant has not explained or otherwise satisfactorily demonstrated by competent evidence that it would be in the interest of justice to excuse the failure to apply within the time allotted.

13. On 2 July 2019, the Board again denied his request. After review of the application and all evidence, the Board determined there is insufficient evidence to grant relief. The board applied Office of the Secretary of Defense standards of liberal consideration and clemency to the complete evidentiary record, including the applicant's statement and found insufficient evidence of error, injustice, or inequity; the applicant had limited creditable service, no wartime service and insufficient evidence of mitigating circumstances for the misconduct. Neither did the Board find sufficient evidence of post-service honorable conduct that might have mitigated the misconduct that resulted in the discharge characterization. The Board agreed that the applicant's discharge characterization is appropriate.

14. By regulation (AR 635-200), a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

15. 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 Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant was found guilty and was convicted by court martial for violating the UCMJ for AWOL. The court sentenced him to reduction to the grade of E-1, confinement, and separation from service with a bad conduct discharge. The finding of guilty and the sentence were affirmed, and the sentence of a bad conduct discharge was ordered duly executed. The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board found no

error or injustice in his separation processing. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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 to amend the decision of the ABCMR set forth in Dockets Number:

- AC93-07409, dated 8 September 1993
- AR20190004604 on 2 July 2019

8/8/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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. Army Regulation 635-200 (Personnel Separations), in effect at the time, provides for the separation of enlisted personnel:

a. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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.

c. Paragraph 3-7c states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or for the good of service in selected circumstances.

d. Paragraph 3-11 states a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

2. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

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