

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 July 2024

DOCKET NUMBER: AR20230014588

APPLICANT REQUESTS: an upgrade to his characterization of service to reflect honorable instead of under other than honorable conditions (UOTHC) for the period ending 30 January 1986. In addition, the applicant requests the following:

- his rank to be reinstated from private (PVT)/E-1 to private first class (PFC)/E-3
- a personal appearance before the Board (via video or telephone)

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of The United States)
- DA Forms 2-1 (Personnel Qualification Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 26 April 1980
- Orders Number D-01-900215, dated 30 January 1986
- Army Regulation (AR) 135-178 (Army National Guard and Army Reserve Separation Of Enlisted Personnel)
- Lawyers statement for the Board, dated 21 Sep 2023

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 states "He was injured in a training accident while in a Reserve duty status on 23 June 1980 and hospitalized. He was released on 22 August 1980 from the hospital to limited duty. The Soldier continued to conduct rehabilitation activities at the Philadelphia, Department of Veterans Affairs (VA) Hospital for the next several years although his record indicates his duty limitations were automatically canceled on 23

October 1980. On 18 September 1981, he was promoted to PFC. According to his DA Form 2-1, his expiration of term of service (ETS) date was 2 December 1985. The applicant did not re-enlist. A letter in his Official Military Personnel File dated 30 January 1986, states that he was discharged from the United States Army Reserve (USAR) effective 30 January 1986 with an UOTHC discharge. This discharge characterization is improper because it was after his ETS date, and he was not afforded due process rights with regard to this characterization Army Regulation 135-178 (Army National Guard and Army Reserve Separation of Enlisted Personnel). He received no prior notice of the potential for UOTHC discharge and afforded no opportunity to be heard by a Board. In accordance with (IAW) AR 135-178, paragraph 1-18b (3) (c) (November 1985), prior to receiving an UOTHC discharge, the applicant was required to receive notice of the potential separation with UOTHC and the opportunity to be heard at an administrative separation board. He did not receive this notice as required by regulation. The applicant was not aware that the discharge date was after the ETS date, and he was not aware he was entitled to due process in the form of an administrative separation Board until August 2023. In the interest of justice and fairness, his discharge must be upgraded to honorable, and his rank of private first class restored.”

3. The applicant provides a statement from his lawyer, dated 21 September 2023, that reflects that “On 18 September 1981, the applicant was promoted to PFC. His ETS date listed on this DA Form 2-1 was 2 December 1985. He should have been allowed to ETS on that date. No administrative action had been taken against him prior to that date. A Soldier cannot be held past their ETS date for adverse administrative action if that was the case. However, his record shows he received a letter on 30 January 1986 that stated he was discharged from the USAR effective 30 January 1986, with a UOTHC discharge. There is no indication in the record that he re-enlisted after 2 December, nor does he claim to have. Furthermore, in accordance with the Enlisted Administrative Separation Regulation in place at the time, a Soldier was required to receive prior notice of separation with a UOTHC discharge and an opportunity to be heard at an administrative separation board. The applicant received no prior notice he was facing a UOTHC discharge, and he received no opportunity to be heard on the matter. His discharge after his ETS date was in violation of the regulation, and a violation of his constitutional due process rights. This document is available in its entirety for the Board’s review.”

4. The applicant’s service record reflects the following:

a. DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of The United States) shows he enlisted in the U.S. Army Reserves (USAR) on 3 December 1979, for six years.

b. Initial Active Duty for Training (IADT) Order Number 241-4, dated 3 December 1979 shows:

- he was to report to Fort Jackson, SC on 22 January 1980
- his Advanced Individual Training (AIT) location was listed as One Station Unit Training (OSUT) at Fort Gordon, GA
- length of his IADT was 12 weeks
- his Military occupational specialty (MOS) was 36K (Tactical Wire Operations Specialist)

c. Orders 044-327, dated 5 March 1980 show:

- he was to report to Fort Gordon, GA on 14 March 1980
- MOS to be trained in was 36K

d. On 26 April 1980, he was honorably released from IADT to his Reserve unit. His DD Form 214 shows he was awarded the MOS of 36K and was separated in accordance with paragraph 5-15, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) for completion of MOS training and a minimum of 12 weeks of IADT. He completed 3 months and 5 days of active service during this period.

e. In a medical statement, dated 30 September 1980 shows that the applicant was admitted to Walter Reed Medical Center on 23 June 1980 for injuries incurred while on active duty. He was discharged on 22 August 1980, with the limitations of no marching, running, no unsupervised physical training outside of the hospital and no jumping for 60 days. His limitations were automatically canceled on 23 October 1980.

NOTE: In a prior ABCMR Docket Number AR20210017337, dated 25 May 2022, the applicant requested to have his record show his active duty period from June 1980 to October 1982. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, the Board determined the applicant was convalescing and not on active duty. The Board agreed the applicant was not in a duty status and was not getting paid. The record is absent and supporting documentation to support the applicant's claim that he performed continuous active-duty service in excess of 90 days after his release from IADT on 26 April 1980. Therefore, the Board denied relief.

f. The applicant's record does not reflect any orders or a DD Form 214 which shows this period of active duty service; however, the applicant was still in the USAR.

g. On 25 February 1982, the applicant's commander notified him that based on the unit's attendance records he was absent on 20 to 21 February 1982 during the Unit's scheduled Unit Training Assembly (UTA). Due to his unexcused absences, he could be recommended by a board of officers for transfer to the Individual Ready Reserve or discharged with a character of service "UOTHC". Unless these absences were excused, he would have accrued four unexcused absences. Applicant was allotted 15 days from receipt of this notice to provide justification for his absence. His service record does not reflect, and the applicant does not provide a reply to the commander concerning these absences.

h. On 19 March 1982, the applicant's commander notified him again, that based on the unit's attendance records he was absent on 13 to 14 March 1982 during the Unit's scheduled UTA. Due to his unexcused absences, he could be recommended by a board of officers for transfer to the Individual Ready Reserve or discharged with a character of service "UOTHC". Unless these absences were excused, he would have accrued eight unexcused absences. Applicant was allotted 15 days from receipt of this notice to provide justification for his absence. His service record does not reflect, and the applicant does not provide a reply to the commander concerning these absences.

i. On 22 April 1982, the applicant's commander continued his attempts to notify him, that based on the unit's attendance records he was absent on 17 to 18 April 1982 during the Unit's scheduled UTA. Due to his unexcused absences, he could be recommended by a board of officers for transfer to the Individual Ready Reserve or discharged with a character of service "UOTHC". Unless these absences were excused, he would have accrued 12 unexcused absences. Applicant was allotted 15 days from receipt of this notice to provide justification for his absence. His service record does not reflect, and the applicant does not provide a reply to the commander concerning these absences.

j. On 13 May 1982, the commander notified the applicant of his declaration of his unsatisfactory participation and his initiation to separate him for misconduct under the provisions of AR 135-178. He was now charged with 12 unexcused absences within a one-year period. He further recommended his case be considered by a board of officers to determine whether he should be separated immediately or delay the discharge until his statutory military service obligation was completed. If separated his service may be characterized as "UOTHC". Applicant was allotted 45 days from receipt of this notice to exercise the following privileges:

- He could consult with consulting counsel at no expense to the government, name, address, and phone number of appointed counsel was provided and the applicant was ordered to contact them

- To be represented by appointed counsel for representation, military counsel of choice if available, or civilian counsel at no expense to the government
- He could submit statements in his own behalf
- With the exception of consulting with counsel, to waive the above rights in writing
- To withdraw his waiver and request the case be presented to a board of officers
- He was not required nor authorized to attend meetings or annual training while this action was pending
- Failure to respond to the above notice and request consideration by an administrative separation board would be considered a waiver of that right

k. On 30 June 1982 his commander initiated action to separate the applicant from the USAR for misconduct, by reason of unsatisfactory participation.

l. On 8 July, the request was recommended for approval by the Headquarters of the 157th Separate Infantry Brigade (Mechanized).

m. On 1 August 1982, he was administratively reduced in rank from PVT/E-2 to PVT/E-1 and was subsequently reassigned to the USAR Control Group (Annual Training) with a characterization of service of UOTHC, due to unsatisfactory participation.

n. DA Form 2-1 reflects the following in:

- item 18 (Appointments and Reductions): the applicant was promoted to PFC on 18 September 1981
- item 32c (Service Obligation Expiration Date): 2 December 1985

o. Orders Number D-01-900215, dated 30 January 1986 show he was discharged accordingly from the USAR Ready [Reserve], under the provisions of AR 135-178 with a characterization of service of UOTHC.

p. Due to the applicant's claim of injuries sustained while on active duty, the case is being forwarded to the Medical Staff at the Army Review Boards Agency.

## 5. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA

and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge and restoration of his rank to e3 – Private First Class. The basis for the request is that the discharge was procedurally deficient: Stated through counsel:

“Soldier was injured in a training accident while in a Reserve duty status on 23 June 1980 and hospitalized. He was released on 22 August 1980 from WRAMC [Walter Reed Army Medical Center] to limited duty. The Soldier continued to conduct rehabilitation activities at the Philadelphia, VA hospital for the next several years although his record indicates his duty limitations were automatically canceled on 23 October 1980.

On 18 September 1981, Mr. [Applicant] was promoted to PFC. According to his DA Form 2-1, his ETS date was 2 December 1985. Mr. [Applicant] did not re-enlist. A letter in his Official Personnel File dated 30 January 1986, states that Mr. Toledo was discharged from the USAR effective 30 January 1986 with an OTH discharge.

This discharge characterization is improper because (1) it is after Mr. Toledo's ETS date, and (2) Mr. [Applicant] was not afforded due process rights with regard to this characterization IAW AR 135-178. He received no prior notice of the potential for OTH discharge and afforded no opportunity to be heard a Board.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Orders published by the 79<sup>th</sup> United States Army Reserve Command 1 August 1982 show the applicant was discharged from the USAR under other than honorable conditions effective that day for “Unsatisfactory Participation – Statutory Obligation with less than 2 years.”

d. No medical documentation was submitted with the application and his period of service predates the EMR.

e. The applicant’s first notice of unexcused absences was dated for 25 February 1982 for missing the 20–21-unit training assembly (UTA). This memorandum notified him the next UTA was 13-14 March 1982. A 10 March 1982 memorandum from the commander shows he missed the March UTA as well, was now up to 8 unexcused absences, and the next UTA was 17-18 April 1982. The 22 April memorandum from the commander to the applicant shows he missed the April UTA and was now up to 12 unexcused absences.

f. In a 13 May 1982 memorandum to the applicant, he was informed that because of the 12 unexcused absences:

“I must declare you an unsatisfactory participant and initiate action to separate you from this unit for misconduct under the provisions in Section VII, Chapter 7, AR 135-178. If you are separated, your service may be characterized as under other than honorable conditions.

g. The commander set a suspense date of 15 July 1982.

h. On 30 June 1982, the commander recommended him for separation for “Unsatisfactory Participation of Statutory Obligated Members (Who have not served 24 months active duty).” The commander noted documentation with the proposed recommendation included “Notice of Unsatisfactory Participation and pending Separation (1AA Form 841-R) to member with acknowledgement of receipt of notification of proposed separation.” The applicant was discharged on 1 August 1982.

i. JLV shows the applicant is not registered with the VA.

j. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his discharge for unsatisfactory participation; or that prevented him from attending UTAs and/or maintaining contact with his leadership.

k. It is the opinion of the Agency Medical Advisor that neither a discharge is unwarranted.

l. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

### BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant’s contentions, the military record, and regulatory guidance were carefully considered. Based upon the multiple unexcused absences from training and the findings of the medical review, the Board

concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service and/or a change in the applicant's rank.

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 the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of



proving an error or injustice by a preponderance of the evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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. Army Regulation 135-91 (Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures), Chapter 4-11 provides the criteria for unexcused absences from unit training assemblies.

a. Unsatisfactory participation. A soldier is an unsatisfactory participant when nine or more unexcused absences from scheduled drills occur during a one-year period.

b. Charging unexcused absences. Unless an absence is authorized, a soldier failing to attend a scheduled single or multiple unit training assembly (MUTA) will be charged with an unexcused absence. When absence involves a MUTA (or any portion of a MUTA), the charge will be one unexcused absence for each four-hour period not attended, but not to exceed four unexcused absences. Unexcused absences will remain charged to the soldier on reassignment or reenlistment in another Reserve Component unit.

c. Section III, Unexcused absences, provides that enlisted members who are obligated by statute or contract will be charged with unsatisfactory participation when without proper authority they accrue in any 1-year period, a total of nine or more unexcused absences from scheduled drills. In addition, when they fail to attend or complete annual training. Statutorily or contractually obligated enlisted members who are charged with unsatisfactory participation may be transferred to the IRR.

d. Establishing the one-year period. For counting unexcused absences, the one-year period will begin on the date of the absence. It will end one year later. Beginning dates will be set from each succeeding unexcused absence. When longer than one-year elapses from the date of an absence, it no longer will be counted. The new one-year period will begin on the date of the later absence, if any.

4. Army Regulation 135-178 (Army National Guard and Army Reserve Separation of Enlisted Personnel) prescribes the policies, criteria, and procedures which apply to separation of enlisted members of the Army National Guard of the United States (ARNGUS) and the United States Army Reserve (USAR).

a. Policy. To retain potential mobilization assets, all members who are separated under this regulation for the following reasons prior to completion of their statutory military service obligation will be screened to insure that only those with no potential to meet mobilization requirements are discharged. All others will be retained as members

of the IRR in accordance with the criteria set forth in the referenced provisions of this regulation to complete their statutory military service obligation. These criteria are based upon the probability that, under conditions of full mobilization, such members would be retained in the Service:

- Expeditious Discharge Program
- Dependency
- Hardship
- Inability to perform prescribed duties due
- to parenthood
- Pregnancy
- Secretarial authority
- Sole surviving sons/daughters and surviving
- family members
- Unsuitability-apathy

b. Chapter 1, paragraph 18b. (3) provides the basis of characterization of service. An UOTHC may be issued when the reason for separation is based upon a pattern of behavior that constitutes a significant departure from acceptable military conduct. This characterization is authorized only if the member has been given the opportunity to request an administrative discharge Board.

c. Chapter 2, reflects that when a member is to be discharged with a discharge under other than honorable conditions, the convening authority will direct the immediate reduction to the pay grade of private/E1.

d. Character of service. The service of members who are transferred to the IRR under the programs cited above will be characterized as honorable or under honorable conditions. This will be based on the member's behavior and performance of duty in the unit, in the same manner as set forth in in this regulation and for type of discharge. Service members transferred to the IRR (prior to 1 December 1982) under the programs cited above with a tentative characterization of service of less than honorable normally will be discharged on their ETS with that characterization.

5. Army Regulation 140-10 (Assignments, Attachments, Details and Transfers), chapter 2-23 proves policy to preclude the loss of potential mobilization assets, Troop Program Unit members whose participation has not been satisfactory as set forth in AR 135-91, chapter 4, may be transferred to the appropriate control group of the IRR to complete their statutory military service obligation or contractual obligation.

6. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//