

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 September 2024

DOCKET NUMBER: AR20230015005

APPLICANT REQUESTS:

- an upgrade of his already-upgraded general, under honorable conditions to honorable
- a video/telephonic appearance before the Board

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, 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 is requesting an upgrade of his discharge to honorable. He is 76 years old and suffers from severe ulcerative colitis, rheumatism arthritis, enlarged prostate, high blood pressure, and a large bunion on the big toe of the left foot. He is disabled and has been depending on the Department of Veterans Affairs (VA) benefits to provide for his survival. His actions, while serving in the Army at Fort Bragg, NC, were based on his first sergeant who was a grand Wizard of the KKK. He believes he was considered for an upgrade when he resided in Detroit, MI and the upgrade was granted. He is unsure why it is being questioned now.
3. A review of the applicant's service record shows:
  - a. He was inducted into the Army of the United States on 27 September 1967.
  - b. On 13 November 1968, he was convicted by a special court-martial of one specification of being absent without leave (AWOL) from on or about 2 October 1968 to 4 November 1968. His sentence included reduction to private, E-1, confinement for 5 months, 3.5 months suspended for 5 months, and forfeiture of \$46.00 per month for 5 months.

c. Special Court-Martial Order Number 194 shows the convening authority approved the sentence on 15 November 1968.

d. On 22 January 1969, he was convicted by a special court-martial of two specifications of being AWOL from on or about 1 January 1969 to on or about 6 January 1969 and again from on or about 6 January 1969 to on or about 9 January 1969. His sentence included confinement for 6 months, suspended for 6 months, and forfeiture of \$46.00 per month for 3 months.

e. Special Court-Martial Order Number 17 shows the convening authority approved the sentence on 23 January 1969.

f. Special Court-Martial Order Number 15 dated 11 February 1969, so much of the sentence as is in excess of confinement at hard labor for one month (suspended for one month, with provision for automatic remission) and detention of \$46.00 pay per month for one month until 31 August 1969 in the SCM case of the applicant as promulgated in SCM Order Number 17, dated 23 January 1969 was set aside. All rights, privileges, and property of which the accused has been deprived by virtue of the finding of guilty and that portion of the sentence so set aside will be restored.

g. On 3 April 1969, the applicant's immediate commander notified the applicant of his intent to separate the applicant under the provisions of Army Regulation (AR) 635-212 (Personnel Separation – Discharge Unfitness and Unsuitability), paragraph 6a (1) for unfitness and the applicant. The specific reasons for his proposed recommendation were based upon, the frequent incidents of discreditable nature with military authorities. The applicant had three occasions of AWOL and two previous convictions by courts-martial for AWOL. The applicant had four Article 15's for dereliction in performance of duty, missing reveille, and for having a knife in excess of 2.5 inches. The applicant was reduced to private (E-2) vacated on 5 June 1968 due to his AWOL. He recommended an Undesirable Discharge Certificate.

h. On 7 April 1969, after consulting with legal counsel, he acknowledged:

- he waived consideration of his case by board of officers
- he waived personal appearance before a board of officers
- he waived representation by counsel
- he may expect to encounter substantial prejudice in civilian life in the event an undesirable discharge under honorable conditions is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may expect to encounter substantial prejudice in civilian life

i. On 18 April 1969, the chain of command recommend approval for separation under the provisions of AR 635-212, for unfitness. He recommended an Undesirable Discharge Certificate.

j. On 5 May 1969, the separation authority approved the discharge recommendation for separation under the provisions of AR 635-212, for unfitness. He would be furnished an Undesirable Discharge Certificate.

k. On 9 May 1969, he was discharged from active duty under the provisions of AR 635-212, for unfitness with a under other than honorable conditions characterization of service. His DD Form 214 (Report of Separation from Active Duty) shows he completed 1 year, 3 months, and 26 days of active service with 166 days of lost time. It also shows he was awarded or authorized the National Defense Service Medal.

l. On 12 April 1977, the DOD Special Review Board upgraded his under other than honorable conditions to general, under honorable conditions. As a result, the applicant's DD Form 214 was voided and he was reissued a new DD Form 214 reflective of the entry in item 18 (Remarks) that shows, the applicant's character of service was upgraded from under other than honorable conditions to general, under honorable conditions on 12 April 1977.

4. By regulation (AR 635-212), an individual was subject to separation for unfitness when one or more of the following conditions existed:

- frequent incidents of a discreditable nature with civil or military authorities
- sexual perversion
- drug addiction or the unauthorized use or possession of habit-forming drugs
- an established pattern of shirking;
- an established pattern showing dishonorable failure to pay just debts.
- an establish pattern showing dishonorable failure to contribute accurate support to dependents or failure to comply with orders, decrees comma or judgments of a civil court concerning support of dependents

5. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

6. 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.

7. 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 (AHLTA), 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 9 May 1969 under honorable conditions discharge citing his current medical disabilities. He does not cite a mental health condition and has not indicated such on his DD 149.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 27 June 1967 and received an under honorable conditions discharge on 9 May 1969 under the provisions provided in AR 635-212, Discharge – Unfitness and Unsuitability (8 November 1966).

d. From his company commander's 3 April 1969 recommendation the applicant be separated from the Army:

"This soldier has had three (3) occasions of AWOL and two previous convictions by courts-martial for AWOL. This soldier has had four (4) Article 15 punishments. One was for derelict in performance of duty, one for missing reveille, one for absenting himself from his appointed place of duty and one for having a knife with a blade in excess of 2½ inches. In addition, a reduction of E-2 was vacated on 5 June 1968 due to his being absent from his appointed place of duty. There appears to be no grounds for any other disposition of this soldier."

e. There is no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

f. JLV shows he has awarded several VA service-connected disability ratings in February 2022. None of these are for nor has he been diagnosed with a mental health condition.

g. The DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

h. It is the opinion of the ARBA medical advisor that a discharge upgrade is unwarranted.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. 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. The evidence shows, following a series of misconduct (court-martial conviction, AWOL, Article 15s), the applicant's chain of command initiated separation action against him. The applicant was discharged for unfitness, frequent incidents of a discreditable nature with civil or military authorities, with an under other than honorable conditions characterization of service. The Board found no error or injustice in his separation processing. The Board also noted that the DOD Special Review Board upgraded his character of service to general, under honorable conditions. The Board agreed that in view of his misconduct and lost time, a general discharge is appropriate in the applicant's case.

b. The Board further considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination that there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference in support of a clemency determination. Therefore, 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:

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.

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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 (ABCMR) 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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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 635-8 (Separation and Processing Documents) states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor. 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 member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 10–6. Medical and mental examination provides that a medical examination is not required but may be requested by the Soldier under AR 40–501, chapter 8.

5. Army Regulation 635-212 (Personnel Separation – Discharge Unfitness and Unsuitability), in effect at the time, sets forth the policy and procedures for separation of enlisted personnel for unfitness. Paragraph 6a provided that an individual was subject to separation for unfitness when one or more of the following conditions existed: (1) frequent incidents of a discreditable nature with civil or military authorities; (2) sexual perversion; (3) drug addiction or the unauthorized use or possession of habit-forming drugs or marijuana, (4) an established pattern for shirking; (5) an established pattern

showing dishonorable failure to pay just debts. and (6) and establish pattern showing dishonorable failure to contribute accurate support to dependents or failure to comply with orders, decrees comma or judgments of a civil court concerning support of dependents.

6. 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.

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 based on 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.

7. Section 1556 of Title 10, United States Code, 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//