

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 October 2024

DOCKET NUMBER: AR20240000954

APPLICANT REQUESTS: upgrade of his discharge under other than honorable conditions (UOTHC).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Letter from the Department of Veterans Affairs (VA)
- VA Form 21-22 (Appointment of Veterans Service Organization as Claimant's Representative)

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, in effect, he desires an upgrade of his characterization of service because the Department of Veterans Affairs (VA) informed him that his service is not considered honorable for the purpose of being eligible to receive VA benefits. His current service characterization is also hindering him from obtaining employment. The applicant indicates on his DD Form 149 that reprisal or whistleblower is related to his request.

3. On 17 November 1999, the applicant enlisted in the Regular Army in the rank/pay grade of private (PV1)/E-1 for a period of 4 years. Upon completion of training, he was assigned to a unit at Fort Stewart, GA.

4. DA Forms 4856 (Developmental Counseling Form) show the applicant was counseled on divers occasions between 18 September and 5 October 2000. He was repeatedly advised that continued misconduct could result in punishment under the provisions of the Uniform Code of Military Justice (UCMJ) and or administrative separation from the Army, and the potential consequences of such a separation. He was counseled regarding his:

- Responsibility to maintain a proper uniform and appearance on two occasions
- Travelling outside the permitted 250-mile radius without a mileage pass and without informing his squad leader
- Unsatisfactory job performance
- Lack of motivation
- Failure to maintain accountability of his equipment
- Reading a magazine during duty hours
- Sleeping during duty hours on two occasions
- Disobeying a lawful order issued by a noncommissioned officer (NCO) on two occasions
- Being disrespectful in language toward an NCO

5. His Enlisted Record Brief shows he was advanced to the rank/grade of private first class/E-3 on 1 October 2000 and that was the highest rank he held while serving.

6. The applicant's duty status was changed from Present for Duty (PDY) to Absent Without Leave (AWOL) on 13 October 2000; and from AWOL to PDY on 17 October 2000.

7. The applicant was counseled on divers occasions between 29 December 2000 and 20 February 2001. He was repeatedly advised that continued misconduct could result in punishment under the provisions of the UCMJ and or administrative separation from the Army, and the potential consequences of such a separation. He was counseled regarding his:

- Actions that were unbecoming of a Soldier
- Failure to be at his appointed place of duty at the time prescribed
- Being AWOL from 6 to 12 February 2001
- Failing to notify his chain of command of his whereabouts and/or situation

8. On 20 March 2001, the applicant accepted nonjudicial punishment under the provisions of Article 15, of the UCMJ for being AWOL on or about 6 February 2001 until on or about 13 February 2001. His punishment included reduction to private/E-1, suspended, to be automatically remitted if not vacated before 18 June 2001; forfeiture of \$243.00 pay; and extra duty for 14 days.

9. The applicant was counseled on divers occasions between 29 December 2000 and 20 February 2001. He was repeatedly advised that continued misconduct could result in punishment under the provisions of the UCMJ and or administrative separation from the Army, and the potential consequences of such a separation. He was counseled regarding him/his:

- Substandard military appearance

- Need for improvement in the area of military courtesy
- Dereliction of duty
- Missing accountability formation on three occasions
- Disobeying a lawful order issued by an NCO
- Failure to be at his appointed place of duty at the time prescribed

10. On 17 July 2001, the applicant was counseled regarding a urine sample he provided during a company urinalysis on 25 June 2001 testing positive for a controlled substance. He was reminded that misconduct of this nature could result in punishment under the provisions of the UCMJ and or administrative separation from the Army, and the potential consequences of such a separation.

11. A Provost Marshall blotter extract, dated 18 August 2001, shows that marijuana residue was found during a health and welfare inspection of the applicant's barracks room on 17 August 2001. The applicant was on emergency leave at the time of the inspection.

12. A memorandum rendered by the applicant's battalion executive officer on 17 October 2001 shows he informed the applicant's company commander of an incident that occurred on 3 or 4 October 2001. During this incident, the applicant was shirking his duty, out of uniform, and disrespectful of a superior commissioned officer. The memorandum is available in its entirety for the Board's consideration.

13. On 22 October 2001, a bar to reenlistment was initiated against the applicant due to his pattern of misconduct.

14. A DD Form 458 (Charge Sheet) shows court-martial charges were preferred against the applicant on 7 January 2002, violation of the UCMJ. He was charged with:

- Eight Specifications of violating Article 86, of the UCMJ by failing to go at the time prescribed to his appointed place of duty.
- Violation of Article 89, of the UCMJ by behaving himself with disrespect toward a superior commissioned officer by failing to address him as Sir or Major, using a threatening manner and demeanor in his actions toward him, and by failing to issue a salute when he was dismissed.
- Violation of Article 112a, of the UCMJ by wrongfully possessing traces of marijuana.

15. On 14 January 2002, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC

discharge; and the procedures and rights that were available to him. He elected not to submit statements in his own behalf.

16. The applicant's chain of command recommended approval of his request for discharge with his service characterized as UOTHC.

17. On 16 January 2002, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial. He directed his service be characterized as UOTHC. The applicant was also barred from entering the local military installations for a period of 5 years.

18. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 5 February 2002, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial By Court-Martial" with Separation code "KFS" and Reentry code "4." He was credited with completion of 2 years, 2 months, and 15 days of net active service this period. He had time lost due to AWOL from 13 to 16 October 2000, and from 6 to 12 February 2001. He did not complete his first full term of service.

19. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 23 June 2014, the applicant was informed that after careful review of his application, military records, and all other available evidence, the ADRB determined he was properly and equitably discharged and denied his request.

20. The applicant provides a letter from the VA, dated 16 June 2015, wherein he was informed that his service is not considered honorable for the purpose of being eligible to receive VA benefits. He also provides a VA Form 21-22, which shows he appointed a VA Department Service Officer as his representative for his claim for VA benefits on 1 August 2023.

21. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

22. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

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 applicant was charged with commission of offenses (8 counts of failing to go at the time prescribed to his appointed place of duty, one count of behaving himself with disrespect toward a superior commissioned officer, using a threatening manner and demeanor, and one count of wrongfully possessing traces of marijuana) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Also, the applicant provided insufficient evidence of a persuasive nature 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 three 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 three-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 regulation provides that 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. It is not an investigative body.

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

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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.

c. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

4. 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/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.

//NOTHING FOLLOWS//