

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 September 2024

DOCKET NUMBER: AR20240001281

APPLICANT REQUESTS: in effect, upgrade his under other than honorable conditions discharge to honorable.

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, in effect, he believes his command retaliated against him; following his reenlistment, the Army assigned him to an attack helicopter company in the 101st Airborne (AB) Division, Fort Campbell, KY.
 - a. The applicant's leadership sent him on a 2-week ammunition guarding detail after the applicant disagreed with his commander and senior noncommissioned officers (NCO) about to their negative assessment of the unit; in their view, the unit "didn't measure up to the 101st AB."
 - b. "These 2 week assignments continued repeatedly for several months. I asked to be transferred during this time and nothing was done, so I told them I would be at the house until the transfer was made."
 - c. The applicant adds, "In (the) early 1980s, I went to appear in front of a board for what I thought was a discharge upgrade and full military benefits at (a building [REDACTED]). I was asked outside the boardroom by a Soldier sitting at a desk (what my reason (was) for being there; I told him what is stated above; he asked to see my records, he looked at them, and said he didn't understand why I was there. He had me take a seat, he went inside the hearing room, returned and said I (did not) need to appear, my request was approved." (The Army Review Boards Agency has no records indicating the applicant filed a previous application to upgrade his character of service).

3. A review of the applicant's service records shows the following:

a. On 30 January 1976, the applicant enlisted into the Regular Army for 4 years. Upon completion of initial entry training and the award of military occupational specialty (MOS) 13E (Cannon Fire Direction Fire/Support Specialist), orders assigned him to a field artillery battalion at Fort Sill, OK; he arrived at his new unit, on 14 May 1976. Effective 26 June 1978, his leadership promoted him to sergeant (SGT)/E-5.

b. On or about 7 September 1979, after extending his enlistment, the applicant transferred to Fort Eustis, VA to attend training in MOS 67V (Observation/Scout Helicopter Repairer); he graduated in December 1979. On 4 December 1979, he immediately reenlisted for 4 years and requested reassignment to Fort Campbell, KY; he arrived at his new duty station, on 10 December 1979.

c. On 27 May 1980, the applicant's commander initiated a bar to reenlistment against him. The commander stated:

(1) "[Applicant] has set a very poor example as a Soldier since being assigned to this unit. He has had numerous letters of indebtedness and has made little or no attempt at restitution. He has written over \$1,000.00 worth of bad checks in an apparently deliberate measure to obtain needed funds to repair his automobile."

(2) "[Applicant] has been late for work on several occasions and has received one Article 15 for failure to repair (i.e., failing to report to his place of duty at the time prescribed). He has been counseled many times on his repeated shortcomings and has not responded. He is a weak NCO and a constant source of irritation to seniors and subordinates."

d. On 16 June 1980, the applicant's higher command approved the bar to reenlistment. On 11 July 1980, his unit reported him as absent without leave (AWOL) and, on 10 August 1980, dropped him from unit rolls. On 28 November 1980, the applicant surrendered himself to military authority at Fort Campbell. On 2 December 1980, the applicant arrived at the U.S. Army Personnel Control Facility (PCF) at Fort Knox, KY.

e. On 4 December 1980, the U.S. Army Personnel Control Facility preferred court-martial charges against the applicant for having been AWOL, from 11 July to 28 November 1980 (140 days). On 5 December 1980, after consulting with counsel, the applicant voluntarily requested discharge in-lieu of trial by court-martial under the provisions of chapter 10 (Discharge for the Good of the Service), Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel). In his request, he stated no one had subjected him to coercion and counsel had advised him of the implications of his

request; the applicant further acknowledged he was guilty of the charge. He elected to submit a statement in his own behalf, in which he wrote the following:

(1) The applicant stated his age and that he had graduated from high school; he enlisted into the Army so he could get married and provide for his wife and daughter. After enlisting, his primary MOS was 13E.

(2) The applicant requested separation under chapter 10, AR 635-200 because it was the only way to keep his family together. The pressure of Army life had taken a toll on his wife, and she was suffering from a stress-related intestinal condition. The applicant believed that his being in the Army had caused his wife's condition, and he added that all of his problems started after he and his wife separated in February 1978. His morale suffered and his attitude toward the Army steadily declined.

(3) The applicant noted he normally did not condone Soldiers who went AWOL, and he hoped he would not need to go AWOL again; he concluded, "I wish to be granted a chapter 10 discharge so that the military's purpose and my purpose too can be fulfilled legally."

f. On 5 December 1980, the U.S. Army Personnel Control Facility placed the applicant on excess leave, and he departed Fort Knox that same day. On 20 January 1981, the separation authority approved the applicant's separation request and directed his under other than honorable conditions discharge; additionally, the separation authority ordered the applicant's reduction to the lowest enlisted grade. On 11 March 1981, orders discharged the applicant accordingly.

g. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the following:

- Item 4a (Grade, Rate, or Rank) and 4b (Pay Grade) – private (PV1)/E-1
- Item 12a (Record of Service – Date Entered AD (active duty) This Period) – 4 December 1979 (sic)
- Item 12c (Net Active Service This Period) – "00/10/21" (sic)
- Item 12d (Total Prior Active Service) – "03/10/24" (sic)
- Item 12h (Effective Date of Pay Grade) – 20 January 1981
- Item 25 (Separation Authority) – chapter 10, AR 635-200
- Item 28 (Narrative Reason for Separation) – "Administrative Discharge – Conduct Triable by Court-Martial"
- Item 29 (Dates of Time Lost During This Period) – 19800711-19801127

4. AR 15-185 (ABCMR), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, his bar to reenlistment, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. The Board concurs with the corrections described in the Administrative Note(s) below.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Other than the corrections addressed in Administrative Note(s) below, the Board determined 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

X

CHAIRPERSON

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):

1. Effective 1 October 1979, the Army stopped issuing DD Forms 214 for each immediate reenlistment. The applicant's DD Form 214 inaccurately lists the date he entered active duty, in item 12a, as "79/12/04" (the date of his immediate reenlistment). This date instead should be "76/01/30." Based on this correction, items 12c and 12d also require correction; respectively, 12c should read "04/08/23," and item 12d should show, "00/00/00."

2. Army Regulation 635-8 (Separation Processing and Documents), currently in effect, states:

a. Soldiers who have previously reenlisted without being issued a DD Form 214 and who are later separated with any characterization of service except "Honorable," DD Form 214 preparers are to enter "CONTINUOUS HONORABLE SERVICE FROM" (first day of service for which DD Form 214 was not issued) UNTIL (date before commencement of current enlistment). Then, reflect the specific periods of reenlistment as prescribed above.

b. Item 18 (Remarks) of the applicant's DD Form 214 should include the following comment: "CONTINUOUS HONORABLE SERVICE FROM 19760130 UNTIL 19791203."

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 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 1-13a (Honorable Discharge) stated an honorable character of service represented a separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when a Soldier's subsequent honest and faithful service, over a greater period, outweighed any disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. Paragraph 1-13b (General Discharge). A general discharge was a separation under honorable conditions and applied to those Soldiers whose military record was satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

c. Section II (Secretarial Authority), Paragraph 5-3 (Authority). The separation of enlisted personnel was the prerogative of the Secretary of the Army. The discharge of any enlisted member of the Army for the convenience of the government was to be at the Secretary's discretion, with the issuance of an honorable or a general discharge certificate, as determined by the Secretary.

d. Chapter 10 applied to Soldiers who had committed an offense or offenses for which the punishment under the Uniform Code of Military Justice included a punitive (i.e., bad conduct or dishonorable) discharge.

(1) Soldiers could voluntarily request discharge once charges had been preferred; commanders were responsible for ensuring such requests were personal decisions, made without coercion, and following being granted access to counsel. Commanders were to give the Soldier a reasonable amount of time to consult with counsel prior to making his/her decision.

(2) The Soldier made his/her request in writing, which certified he/she had been counseled, understood his/her rights, could receive an under other than honorable conditions character of service, and recognized the adverse nature of such a character of service. Consulting counsel was to sign the request as a witness.

3. The Manual for Courts-Martial, in effect at the time, showed punitive discharges were among the maximum punishments for violations of Article 86 (AWOL for more than 30 days).

4. AR 600-200 (Enlisted Personnel Management System), in effect at the time, prescribed policies and procedures for enlisted promotions and reductions. The regulation stated commanders were to reduce Soldiers discharged under other than honorable conditions to the lowest enlisted grade; no board action was required.

5. AR 635-5 (Separation Documents), in effect at the time, prescribed policies and procedures for DD Form 214 preparation. The regulation stated the narrative reason for separation was tied to the Soldier's regulatory separation authority and directed DD Form 214 preparers to AR 635-5-1 (Separation Program Designators (SPD)) for the appropriate entries in item 28 (Narrative Reason for Separation).

6. AR 635-5-1 (SPD) in effect at the time, stated Soldiers separated in accordance with chapter 10, AR 635-200 were to receive an SPD of "JFS" and have, "Administrative Discharge – Conduct Triable by Court-Martial" entered in item 28 of their DD Form 214.

7. AR 601-280 (Army Reenlistment Program), in effect at the time, prescribed policies and procedures for the reenlistment of current and former Soldiers.

a. Paragraph 2-22b (Waivable Disqualification/AWOL/Time Lost) stated the Commanding General, U.S. Army Military Personnel Center could approve a reenlistment waiver for former Soldiers who had been AWOL for more than 30 days.

b. Appendix D (Reenlistment Eligibility (RE) Codes) showed the following:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for reenlistment unless waiver consideration was permissible and was granted
- RE-3B – Waiver required due to Soldier having lost time
- RE-3C – Waiver required due to Soldier not meeting grade requirements in basic eligibility criteria
- RE-4 – Not eligible for reenlistment. Nonwaivable disqualification

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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 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.

9. Title 10, U.S. Code, section 1034 (Military Whistleblower Protection Act (MWPA), enacted 29 September 1988, amended Title 10 provisions relating to communications with a Member of Congress by prohibiting any person from restricting a member of the U.S. Armed Forces to communicate with an Inspector General (IG), except for communications that were prohibited by statute.

a. The law prohibited retaliatory personnel actions against a member for making or preparing to make such a communication.

b. The law also directed the Department of Defense IG (DOD IG) to promptly investigate any allegation that a prohibited personnel action has taken place or been threatened with respect to any communication to a Member of Congress or IG complaining or disclosing information reasonably believed to evidence a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Within 10 days of completing such an investigation, the IG was required to report the results to the Secretary of Defense.

c. Members of the U.S. Armed Forces could, within 30 days after receipt of a copy of such investigative report, to petition the appropriate military board for correction of his or her military record concerning the matter, and the members were entitled to receive legal assistance by a judge advocate in any such matter before a military corrections board. The Act provided administrative procedures for the hearing of such petitions, together with appropriate corrective and disciplinary action to be taken and allowed for

judicial review of any order resulting from such hearing, if petitioned for within 60 days after notice of the hearing's result.

10. AR 15-185 (ABCMR) states the ABCMR decides cases on the evidence of record; it is not an investigative body.

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary). The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence must be sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

b. An applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

//NOTHING FOLLOWS//