

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 November 2024

DOCKET NUMBER: AR20240004251

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a favorable change of his separation code

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 21 May 1990
- Three Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- Self-Authored Statement
- Two Character Reference Statements

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 accused of having inappropriate behavior with his Soldier. There was a beer festival on post where they ate and drank beer all day. That evening, he returned to the barracks alone and continued drinking. Later on that night, his Soldier came to his room where they continued drinking. The applicant blacked out and doesn't remember anything else. The other Soldier wrote a statement to the chain of command that he had been fondled. The applicant told the first sergeant that he didn't remember doing anything like that. He met with military counsel, that advised him to get out of the Army in lieu of court-martial, so he took it. The applicant really believes the incident was just two Soldiers getting drunk and ending up in bed.
3. On 23 July 1973, the applicant enlisted in the Regular Army. He was honorably discharged for immediate reenlistment on 3 May 1976. The available record is void of a DD Form 214 for this period of service.

4. He reenlisted in the Regular Army on 4 May 1976.
5. On 11 June 1981, the applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go at the time prescribed to his appointed place of duty, on or about 3 June 1981; operating a U.S. government vehicle while drunk, on or about 3 June 1981; and being drunk on duty, on or about 3 June 1981. His punishment included reduction to E-4 and forfeiture of \$398.25 per month for 2 months.
6. He reenlisted on 30 April 1982 and again on 17 April 1985.
7. Court-martial charges were preferred against the applicant on 11 April 1990, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of committing sodomy with a Soldier, by force and without consent, on or about 3 March 1990; and one specification of undressing a Soldier, then a subordinate member of his squad, after he was drunk and fell asleep, got into the bed naked with the Soldier, on or about 3 March 1990.
8. On 24 April 1990, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.
 - a. Subsequent to receiving legal counsel, 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 his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.
 - b. He submitted a statement in his own behalf; however, the available record is void of a statement.
9. By legal review, the applicant's Chapter 10, separation action was found to be legally sufficient for further processing.
10. The separation authority approved the applicant's request for discharge on 27 April 1990, and directed issuance of a DD Form 794A Under Other Than Honorable Conditions Discharge Certificate and his reduction to the grade of E-1.

11. The applicant was discharged on 21 May 1990. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service characterized as under other than honorable conditions. He was assigned separation code KFS and reentry code 3. He completed 14 years and 18 days of active service this period.

12. Additionally his DD Form 214 shows he was awarded or authorized the Army Service Ribbon, Overseas Service Ribbon (2nd Award), Expert Badge with M-16 Rifle Bar, Army Good Conduct Medal (5th Award), Army Achievement Medal (1st Oak Leaf Cluster), Army Commendation Medal, National Defense Service Medal, Driver and Mechanic Badge, Driver Wheel Vehicle, and Noncommissioned Officer Professional Development Ribbon (2nd Award).

13. The applicant provides:

a. Two character reference letters that collectively attest to his faith, family values, work ethic and the support he provides those in his community.

b. Miscellaneous VA documents in support of his VA claim.

14. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

15. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

BOARD DISCUSSION:

1. 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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with an offense, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and

designated characterization of service. Based on a preponderance of the evidence, the Board concluded that the characterization of service and separation code the applicant received upon separation was not in error or unjust.

2. Upon review of the applicant's service record, the Board determined he served a period of continuous honorable service from 23 July 1973 to 17 April 1985 and his record should reflect that service accordingly.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 21 May 1990, to show Continuous Honorable Active Service from 23 July 1973 to 17 April 1985.

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading his characterization of service.

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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 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "KFS" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. 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), on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also

applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//