

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 December 2024

DOCKET NUMBER: AR20240004455

APPLICANT REQUESTS: upgrade of his under other than honorable conditions characterization of service.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 293, Application for the review of Discharge from the Armed Forces of the United States

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 had many problems going through separation with is spouse. He tried to get help with counseling, but he did not get that. He started drinking and doing drugs. He came to his hometown to see his wife, but he fell in jail for 9 months. He was release from jail and was picked up by the Army to go back to Colorado where he was given a discharge. If he would have gotten help when assigned to Colorado, his discharge would have been honorable. He is asking the Board again for help.
3. The applicant was serving in the Army National Guard, when he was involuntarily ordered to active duty for 18 months 24 July 1979.
  - a. The applicant held military occupational specialty 45B, Small Arms Repairer, and was assigned to the 704th Maintenance Battalion at Fort Carson, CO.
  - b. On 8 August 1980, the applicant was convicted by civil court of attempted criminal sexual penetration by force, in the State of New Mexico, and was sentenced to serve a term of 18 months (sentence suspended except for 9 months already served). He had been released from jail on 24 July 1980 but did not return to military control. His parent unit erroneously carried him as confined civil authorities during the entire period of his release until he was apprehended again in the State of New Mexico on 19

February 1982, for drunk and reckless driving. He was released from civil custody on 15 March 1982 and returned to duty.

c. On 22 March 1982, the applicant's commander notified the applicant that under the provisions of Army Regulation (AR) 635-200 (Personnel Separations), Chapter 14 the commander is initiating action to separate him for Conviction by Civil Court. The reasons for the proposed action are: The applicant was convicted by civil court of attempted criminal sexual penetration by force and was sentenced to serve a term of 18 months (sentence suspended except for 9 months already served).

d. On 22 March 1982, the applicant acknowledged receipt of the notification of separation memorandum. He indicated he had been advised by his consulting counsel of the basis for the contemplated action to separate him for Conviction by Civil Court AR 635-200, Chapter 14, and its effects; of the rights available to him; and of the effect of any action taken by him in waiving his rights. He waived consideration of his case by a board of officers and waived personal appearance before a board of officers. He also declined making a statement on his own behalf.

e. On 23 March 1982, the applicant's immediate commander recommended the applicant be discharged from active duty due to misconduct, conviction by civil court. The intermediate and senior commanders recommended approval of the discharge.

f. On 26 April 1982, the Separation Authority/Commanding General (CG) approved the waiver of a hearing before a board of officers by the applicant on 22 March 1982, waived the requirement for rehabilitative measures, and approved the discharge under the provisions of paragraph 14-12, AR 635-200. The CG ordered an Under Other Than Honorable Conditions Discharge Certificate be furnished.

g. On 7 May 1982, the applicant was accordingly discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in accordance with chapter 14-12 of AR 635-200 with an under other than honorable conditions discharge, with Separation Code JKB and Reentry Code 4. He completed 2 years, 4 months, and 17 days of active service with multiple periods of lost time (as indicated in the Remarks Block of his DD Form 214).

4. 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.

#### 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 evidence of record shows the applicant was convicted by a civil court of the charge of attempted criminal sexual penetration by force, in the State of New Mexico, and was sentenced to serve a term of 18 months (sentence suspended except for 9 months already served). As a result, his chain of command initiated separation action against him due to his civil conviction. He was discharged with 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 post-service achievements or letters of reference of a persuasive nature, and that outweigh his misconduct, in support of a clemency determination. Based on a preponderance of evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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 635-200 (Personnel Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a states that 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. Paragraph 3-7b states that 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. Chapter 14 establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. Service members would be considered for discharge when it was determined that one or more of the following applied: (a) when the Soldier was initially convicted by civil authorities, or action taken against the Soldier which was tantamount to a finding of guilty, of an offense for which the maximum penalty under the Uniform Code of Military Justice was death or confinement in excess of 1 year; (b) when initially convicted by civil authorities of an offense which involved moral turpitude, regardless of the sentence received or maximum punishment permissible under any code; or (c) when initially adjudged a juvenile offender for an offense involving moral turpitude. An undesirable/under other than honorable conditions discharge was normally considered appropriate.

3. 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. 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. 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//