

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 October 2024

DOCKET NUMBER: AR20240005636

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

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge)

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 stated he would like the Board to change his UOTHC discharge to an honorable discharge because he feels like he was coerced, at the time, to accept the UOTHC discharge rather than having a trial.
3. The applicant's service record contains the following documents:
 - a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army (RA) and entered active duty on 16 June 2000. He remained in the RA through immediate reenlistment on 4 June 2006.
 - b. The applicant's Enlisted Record Brief, 22 August 2007, shows he attained the rank of sergeant (SGT) with a date of rank of 1 April 2004.
 - c. DD Form 458 (Charge Sheet) shows he was charged with one specification of committing the offense of carnal knowledge with a person who had attained the age of 12 but was under the age of 16 on 10 September 2007.
 - d. A memorandum for record, 16 November 2007, from the commanding general shows he withdrew the charge of committing the offense of carnal knowledge with a person who had attained the age of 12 but was under the age of 16. However, pursuant to a pre-trial agreement, the applicant was referred to a Special Court-Martial

empowered to adjudge a bad-conduct discharge. His amended DD Form 458 (Charge Sheet) shows he was charged with wrongfully having sexual intercourse with a woman not his wife on 16 November 2007.

e. DD Form 457 (Investigating Officer's (IO) Report), 4 December 2007, and summary of proceedings show the IO recommended on the charge of carnal knowledge to pursue a lesser charge of indecent acts or liberties with a person under 16. On the charge of adultery, the IO recommended to pursue the charge.

f. Applicant's Good Soldier Book, which shows the awards he received and his accomplishments in the Army. The document is available for the Board's review.

g. The applicant's request for separation in lieu of court-martial was not available for the Board's review; however, his chain of command recommended the request be approved based on the IO report that the applicant had reasonable grounds to believe that the accused was at least 16 years of age and did not recommend moving forward with the carnal knowledge charge.

h. On 31 January 2008, the commanding general approved the applicant's request for separation in lieu of court-martial and ordered he be reduced to the grade of private/E-1 and his characterization of service be UOTHC.

i. The applicant's DD Form 214, shows the applicant was discharged in the rank of PVT on 26 February 2008 in accordance with chapter 10 of AR 635-200. He was discharged in lieu of trial by court-martial, his character of service was UOTHC, his separation code was KFS, and his reentry code was 4. He had completed 7 years, 8 months, and 11 days of active duty service. He had continuous honorable service from 16 June 2000 through 3 April 2006. He had immediate reenlistments from 16 June 2000 to 3 April 2006 and 4 April 2006 to 26 February 2008. He was awarded/authorized:

- Army Commendation Medal
- Army Good Conduct Medal (2nd Award)
- Global War on Terrorism Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Driver and Mechanic Bad- Mechanic (2nd Award)
- Army Achievement Medal
- National Defense Service Medal
- Korean Defense Service Medal
- Overseas Service Ribbon

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 an offense (carnal knowledge, amended to having sexual intercourse with a woman not his wife), punishable under the UCMJ with a punitive discharge. After being charged, he presumably 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 available 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.

10/31/2024

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.

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 (Army Board for Correction of Military Records (ABCMR), prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. It states, 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.

3. Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to AD.

d. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

e. A Soldier who requests discharge as prescribed in chapter 10 may be discharged under other than honorable conditions if he/she has been afforded the opportunity (not less than 72 hours) to consult with a consulting counsel.

(1) The Soldier must certify in writing that he/she understands that he/she may receive a discharge under other than honorable conditions.

(2) The Soldier must understand the adverse nature and possible consequences of such a discharge.

(3) The Soldier must personally sign a request for discharge. A conditional request is not permitted.

(4) The consulting counsel will sign as a witness, indicating that he/she is a commissioned officer of The Judge Advocate General's Corps. A Soldier may waive consultation with a consulting counsel. Counsel will prepare a statement to this effect that will be attached to the file; the Soldier will state that the right to counsel has been waived.

f. A Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code KFS is used for discharge In Lieu of Trial by Court-Martial.

5. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

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 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//