

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 December 2024

DOCKET NUMBER: AR20240005780

APPLICANT REQUESTS:

- an upgrade of his characterization of service from under other than honorable conditions to under honorable conditions (general)
- a video/telephonic appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty), 17 July 1978

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 his discharge was unfair. He was told to plead guilty to something he did not do, and he refused. In doing so, he was discharged from the service. It has been 40 years, and the character of this discharge still haunts him. It is something that he wants to take care of before he is no longer able to.

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

a. The applicant enlisted in the Regular Army on 11 June 1975. He held military occupational specialty 31M (Multichannel Communication Equipment Operator). The highest rank/grade he attained was private PV2/E-2.

b. On 9 March 1976, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for on or about 19 February 1976, failing to go at the time prescribed to his appointed place of duty. His

punishment included reduction to the grade of private/E-1 (suspended for 6 months), and forfeiture of \$80.00.

c. On 4 May 1976, the applicant's commander recommended that the applicant be barred from enlistment/reenlistment in the U.S. Army. The commander noted that the applicant had constantly been a problem since being assigned to the Signal Operations Platoon. He was counseled on numerous occasions to no avail. His record of Article 15s and counseling were adequate grounds to warrant approval of this bar.

d. On 4 May 1976, the applicant's immediate commander notified him of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), chapter 5, under the Expeditious Discharge Program. The commander listed the following as the specific reasons:

- Poor attitude
- Lack of self-discipline
- Failure to demonstrate promotion potential
- Inability to accept instructions and directions
- Lack of cooperation with peers and superiors

e. The applicant acknowledged receipt of the separation notification on the same date. He was advised of the rights available to him and the effect of waiving his rights. He declined the proposed discharge action and elected not to submit a statement in his own behalf.

f. On 7 May 1976, he accepted NJP under the provisions of Article 15, UCMJ, for on or about 20 April 1976, unlawfully striking private first class (PFC) [REDACTED] in the face with his fist. His punishment included forfeiture of \$201.00 for two months (one month suspended for three months) and 45 days extra duty (15 days suspended for 3 months).

g. On 13 May 1976, the Bar to Reenlistment was approved.

h. The applicant's duty status changed on the following dates:

- Present for Duty (PDY) to Absent Without Leave (AWOL) – 30 October 1976
- AWOL to PDY – 2 November 1976

i. Special Court-Martial Order Number 9, dated 1 April 1977, shows:

(1) On 1 April 1977, the applicant was arraigned, tried, and convicted of:

- Charge I: one specification of willfully and wrongfully damaging an 8-track tape player by throwing on the ground, of a value of about \$49.95, on or about 26 October 1976
- Charge II: one specification of stealing an 8-track tape player of value of about \$49.95, on or about 26 October 1976
- Additional Charge: one specification of failing to go at the time prescribed to his appointed place of duty, on or about 1 December 1976

(2) The sentence, adjudged on 1 February 1977, included reduction to the grade of private/E-1, confinement at hard labor for six months, forfeiture of \$249.00 per month for six months, and a bad conduct discharge.

(3) The sentence was approved on 1 April 1977, and the record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

j. Special Court-Martial Order Number 85, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS on 19 May 1978, shows the sentence had been affirmed pursuant to Article 66. The provisions of Article 71(c) had been complied with and the sentence would be duly executed.

k. The applicant was discharged on 17 July 1978. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 11-2, in the rank/grade of private (PV1)/E-1, and his service was characterized as under other than honorable conditions. He completed 2 years, 7 months, and 18 days of net active service during the covered period and had 169 days of lost time. His DD Form 214 shows he was awarded the Marksman Marksmanship Qualification Badge (M-16) and the Expert Marksmanship Qualification Badge (hand grenade).

4. By regulation AR 635-200, a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

5. There is no indication the applicant applied to the Army Discharge Review Board to request an upgrade of his characterization of service within the 15-year Statute of Limitations.

6. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the short term of honorable service completed prior to a pattern of misconduct leading to the applicant's separation, as well as the lack of mitigation for such misconduct, the Board concluded there was insufficient evidence of an error or injustice warranting an upgrade to the applicant's characterization of service.

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.

3/17/2025

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

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. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct or for the good of the service.

d. Chapter 11 addresses enlisted personnel who are given a dishonorable discharge pursuant to an approved sentence of a general court-martial, after completion of appellate review and after such affirmed sentence has been ordered duly executed.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

5. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//