

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 27 July 2023

DOCKET NUMBER: AR20220011688

APPLICANT REQUESTS: Reconsideration of his previous requests for upgrade of his under other than honorable conditions (UOTHC). Additionally, he requests an appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) (two)
- Service Record (partial)
- Department of Veterans Affairs (VA) Letter
- Medical Document

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers:

- AR20070003682 on 11 September 2007
- AR20070010948 on 28 August 2008

2. As a new argument, the applicant states before his tragedy he had surgery on 21 June 1985. He knew something was wrong with him. It turns out that during the surgery metallic clips were left in him. He went past his expiration term of service (ETS) date by about two years. He stayed to be responsible for the tragedy that he caused. Most people would have left at their ETS and gone back to the U.S. On his DD Form 149, the applicant notes disability is related to his request.

3. The applicant had a prior period of honorable service from 21 June 1977 through 30 December 1982. He was honorably Released from Active Duty on 30 May 1982 and transferred to the control of the U.S. Army Reserve.

4. He enlisted in the Regular Army on 30 September 1983 for three years. His military occupational specialty was 11B (Infantryman).

5. The applicant's unit commander notified him on 9 May 1983 of his intent to initiate separation action under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel Separations), Chapter 14, by reason of civil conviction, with a under honorable conditions (general) characterization of discharge. As the specific reason, the commander stated the applicant was convicted by the First Circuit Court of Panama for negligent homicide to the prejudice of three Panamanian nationals. On 4 August 1985, while intoxicated, the applicant drove at a high rate of speed and struck a small concrete building resulting in the death of his passengers. He was sentenced to 3 years of unsuspended confinement. His appeal was considered by the Second Superior Tribunal of Panama. The appellate court affirmed the conviction, but reduced the sentence imposed to 30 months of unsuspended confinement.
6. The applicant waived his right to consult with legal counsel and to appear before an administrative separation board on 11 May 1988. He did not submit a statement in his own behalf. He understood that he may encounter substantial prejudice in civilian life. He further understood that he may be ineligible for many of all benefits as a veteran under both Federal and state laws and that he may expect to encounter substantial prejudice in civilian life. The intermediate commanders recommended he be separated with an UOTHC discharge.
7. On 11 May 1988, the applicant's commander formally recommended his discharge under the provisions of AR 635-200, Chapter 14, prior to his ETS for conviction by civil court.
8. On 27 May 1988, the separation authority approved the recommended action and directed the applicant be discharged with an UOTHC characterization of service.
9. The applicant was discharged on 27 May 1988 by reason of conviction by civil court (foreign tribunal) after completing 4 years, 7 months, and 28 days of active military service in the period under review.
10. The previous case indicates while the applicant's discharge had been approved and a DD Form 214 had been issued to reflect his discharge effective 27 May 1988, that DD Form 214 was not distributed.
11. Subsequently, the applicant was discharged on 31 July 1990. The DD Form 214 he was issued shows he was discharged under the provisions of AR 635-200, Chapter 14, by reason of misconduct-conviction by civilian authorities with Separation Code JKB. His service was characterized as UOTHC. He completed 6 years, 10 months, and 2 days of net active service this period. He lost time from 17 May 1988 to 31 July 1990. He was awarded or authorized the Army Good Conduct Medal and the Parachutist Badge.

12. The applicant provides:

- a. A portion of his service record (partial) and two DD Forms 214.
- b. A medical document, dated 6 November 2008, which states that metallic clips are seen in the right upper quadrant of the abdomen from previous surgical procedure, based on a Radiology Report with Impression.
- c. A VA letter, dated 28 March 2011, shows the applicant's service-connected disability rating with a combined evaluation of 10 percent.

13. On 21 September 2007, the ABCMR determined the applicant was properly and equitably discharged in accordance with regulations in effect at the time. No evidence of arbitrary or capricious actions by the command was found. It appeared that all requirements of law and regulation were met, and the rights of the applicant were fully protected throughout the separation process and denied his application.

14. On 2 September 2008, the ABCMR determined while this Board had a 3-year statute of limitations, the original Board considered the applicant's request on its merits, and this Board is considering the applicant's request on its merits. The board's 3-year statute of limitation was only applied when the applicant's request was found to be without merit. The applicant had not submitted any evidence or argument which would warrant upgrading his UOTHC discharge and denied his application.

15. On 13 August 2010, the ABCMR reviewed his request for reconsideration and determined that his request for reconsideration was not received within one year of the ABCMR's original decision. As a result, his request for reconsideration was returned without further action.

16. 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.

17. MEDICAL REVIEW:

- a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 31 July 1990 discharge characterized as under other than honorable conditions. He states:

“I was past my ETS [end term of service] date, by about two years. Stay on to be responsible for the tragedy that I caused. Most people would have ETS and came back to the states.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows he entered the regular Army on 30 September 1983 and was discharged on 31 July 1990 under the separation authority provided by Section II of Chapter 14 of AR 635-200, Personnel Separations – Enlisted Personnel (26 May 1989): Misconduct – Conviction by Civilian Authorities.

d. From the 5 August 1985 CID report:

“Preliminary investigation revealed that [Applicant] while intoxicated , drove his 1985 Toyota Celica , Panama license 8-70971, containing 5 Panamanian nationals, and another service member on K2 road, empire range, where he lost control of the vehicle and subsequently struck a small concrete building on the passenger side of the vehicle resulting in the death of two Panamanian national females, and one 3-month-old Panamanian national male.

The vehicle was destroyed as a result of the accident. The two surviving Panamanian females, [Applicant], and the other service member, suffered minor injuries and were treated at local hospitals. A blood alcohol test (BAT) was conducted on the driver of the vehicle, [Applicant], at Gorgas Army Hospital, Ancon, RP [Republic of Panama], which indicated a .153 reading.”

e. On 9 May 1988, his company commander notified him of the initiation of separation action under chapter 14 of AR 635-200 stating the reason for his action:

In that you were convicted by the Seventh Circuit Court, Penal Branch, The First Judicial Circuit of Panama of Negligent homicide to the prejudice of [REDACTED], and [REDACTED] on 4 August 1985, at approximately 1730 hours, at K-2 Road, Cocli, Republic of Panama. You were sentenced to three years' unsuspended confinement. Your appeal was considered by the Second Superior Tribunal of Panama. The appellate court affirmed the conviction, but reduced the quantum of the sentence imposed from three years' to thirty months' unsuspended confinement.”

f. Review of his records in JLV shows the applicant has been diagnosed with service-connected “Mood Disorder” (50%).

Kurta Questions:

- (1) Did the applicant have a condition or experience that may excuse or mitigate the discharge?

Yes, a mood disorder.

- (2) Did the condition exist or experience occur during military service?

Yes

- (3) Does the condition or experience actually excuse or mitigate the discharge?

Partially: As mood disorders are associated with self-medicating with drugs and/or alcohol, the condition mitigates his driving while under the influence of alcohol. However, the condition cannot mitigate the criminal conduct of the negligent homicide of three Panamanian nationals.

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, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's claim regarding his health and the review and conclusions of the ARBA Medical Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a health condition. 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:

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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Numbers AR20070003682 on 11 September 2007 and AR20070010948 on 28 August 2008.

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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 (USC), Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

2. AR 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.

3. Title 10, USC, Section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent.

4. Title 10, USC, Section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent.

5. AR 635-200 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 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.

6. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment, retention, and separation (including retirement.) Chapter 3 provides the various medical conditions and physical defects which may

render a Soldier unfit for further military service and which fall below the standards required for the individual in paragraph 3-2, below. These medical conditions and physical defects, individually or in combination:

- significantly limit or interfere with the Soldier's performance of duties
- may compromise or aggravate the Soldier's health or well-being if the Soldier remains in the military – this may involve dependence on certain medications, appliances, severe dietary restrictions, frequent special treatments, or a requirement for frequent clinical monitoring
- may compromise the health or well-being of other Soldiers
- may prejudice the best interests of the government if the individuals were to remain in the military service

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

8. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, Traumatic Brain Injury, sexual assault, or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

9. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and Service BCM/NRs 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//