

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 October 2023

DOCKET NUMBER: AR20230003441

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service, and an 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 (Certificate of Release or Discharge from Active Duty), 20 July 1998
- Autism diagnostic test, 15 May 2022
- behavioral health patient chart, DNA test results, and self-authored statement, 19 December 2022

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 went absent without leave (AWOL) during Advance Individual Training (AIT) because he could no longer function mentally under constant social, physical, and learning pressures. He requested a discharge from his commander, and when he refused, he went to a psychiatrist who misdiagnosed him, refused to discharge him, and prescribed him Wellbutrin. Afterward, he did not know what else to do or how to communicate what was happening to him, so he went AWOL. Eventually, he was apprehended by civilian authorities and spent a few nights in jail before being transferred to an out-processing facility, where he signed some papers and was discharged. Decades later, he was diagnosed with autism and began therapy. He believes if he had been diagnosed with autism when he was younger, many things in life would have worked out differently. Maybe he would have continued serving, not enlisted, better prepared himself, and not have gone AWOL. After reflecting on his past, he believes his autism was why he left the military.

3. The applicant enlisted in the Regular Army on 07 August 1997. The highest rank/grade he held was private first class/E-3.
4. The record contains a series of documents addressing the applicant's absence without leave (AWOL) status:
  - a. Two DA Form 4187 (Personnel Actions) show, effective 6 November 1997, the applicant's unit reported him AWOL and on 5 December 1997, he was dropped from the rolls.
  - b. A DD Form 616 (Report of Return of Absentee) shows, on 1 April 1998, he was apprehended by civilian authorities and returned to military control.
5. On 8 April 1998, court-martial charges were preferred against the applicant. The DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 6 November 1997 and did remain absent until on or about 1 April 1998.
6. The applicant consulted with legal counsel on 9 April 1998.
  - a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.
  - b. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 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 Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.
  - c. He was advised he could submit any statements he desired in his behalf. He waived a physical evaluation prior to separation and elected not to submit a statement in his own behalf.
7. On 8 June 1998, the immediate commander recommended approval of the applicant's request for discharge and the issuance of a discharge UOTHC.

8. On 17 June 1998, the Judge Advocate General conducted a review of the applicant's request for discharge and found no legal objections to further processing in accordance with the unit commander's recommendations.

9. The separation authority approved the applicant's request for discharge under the provisions of AR 635-200, Chapter 10 and ordered the issuance of an UOTHC discharge and the applicant's reduction to private/E-1.

10. The applicant was discharged on 20 July 1998, under the provisions of AR 635-200, chapter 10, in lieu of trial by court-martial, with an UOTHC characterization of service in the grade of E-1. He received a Separation Code of "KFS" and reentry code of "3." His DD Form 214 contains the following entries of information:

a. He completed 6 months and 18 days of net active service during the period covered.

b. Block 18 (Remarks) shows excess leave from 10 April 1998 to 20 July 1998.

c. Block 29 (Dates of Time Lost During This Period) shows lost time from 6 November 1997 to 31 March 1998.

11. The applicant provides:

a. His DNA and Autism diagnostic tests and behavior health patient chart which show he was at risk for having Autism, was screened for Autism, and was officially diagnosed with Autism. His patient chart also indicates he was diagnosed with other behavioral health conditions.

b. An Information Report, dated 23 September 2020, showing a service-connected disability rating of 20 percent for his right leg.

c. A certificate from the Department of Veterans Affairs, dated 15 March 2022, recognizing the applicant's participation in the 2021 National Veterans Creative Arts Competition.

12. Regulatory guidance in effect at the time provided discharges under the provision of AR 635-200, chapter 10, where voluntary requests from the Soldier to be discharged in lieu of a trial by court-martial.

13. The applicant provided argument and/or evidence the Board should consider, along with his overall record, in accordance with the published equity, injustice, or clemency determination guidance.

#### 14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he had mental health condition that mitigated his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 07 August 1997; 2) On 8 April 1998, court-martial charges were preferred against the applicant for being AWOL from 6 November 1997-1 April 1998; 3) The applicant was discharged on 20 July 1998, Chapter 10, in lieu of trial by court-martial, with an UOTHC characterization of service.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) and civilian medical records were also examined.

d. The applicant asserts he went AWOL during his Advance Individual Training (AIT) due to his inability to continue his enlistment as a result of his Autistic Disorder. He stated he was referred to a military psychiatrist when he felt that he could not complete his enlistment, and he was misdiagnosed and prescribed a psychiatric medication. Due to the time of the applicant's enlistment, there is no record of this encounter or any other report of mental health symptoms during his active service.

e. A review of JLV was void of any medical documentation, and the applicant receives no service-connected disability. The applicant did provide some civilian medical documentation, a self-report measure of autistic spectrum disorders, and a self-described DNA test. The civilian medical document was from [REDACTED] located in Kennewick, WA, dated 19 December 2022. It proved some demographics of the applicant and a problem list of disorders, which included the diagnosis of Autistic Disorder. There was no other information provided such as the origins of the diagnosis, the method of assessment, the reported symptomatology, or the qualifications of the evaluator. The self-report measure provided by the applicant was not adequately scored or included in a larger psychological assessment. In addition, the DNA test is not a sufficient measure of the applicant meeting criteria for an Autistic Disorder at the time of his enlistment.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

#### Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing Autistic Disorder that

contributed to his misconduct. He provided a civilian medical document that listed Autistic Disorder on a problem list.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing Autistic Disorder while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. He did provide some documentation that after his discharge Autistic Disorder was listed as a disorder on a problem list from a therapy center he attended. However, there was insufficient evidence presented to the origins or severity of this condition to discern if it would be considered a mitigatable condition at the time of the applicant's enlistment. In addition, there is insufficient evidence he was experiencing a mental health condition that would render him unable to understand the difference between right and wrong and act in accordance with the right at the time of his active service. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents and the evidence found within the military record, the Board found 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 and clemency in determining discharge upgrade requests. The Board considered the length of the applicant's period of AWOL. The Board agreed that although the applicant referenced a post-service diagnosis of autism, there was insufficient specificity to reasonably conclude that it existed at his time of service and therefore, potentially mitigating toward his misconduct. After due consideration of the request, the Board determined that the evidence presented does not meet applicable regulatory guidance and there is no basis upon which to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

:            :            :            GRANT FULL RELIEF

:            :            :            GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

██████    █████    ████████    DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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.

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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. Title 10, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that

directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. AR 15-185 (ABCMR) states 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.

4. AR 635-200, in effect at the time, set forth the primary authority for separating enlisted personnel.

a. Chapter 10 states in part, a member who has committed an offense or offenses, the punishment for any of which, under the Uniform Code of Military Justice (UCMJ) and the Manual for Court-Martial, include bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. In addition, the request for discharge may be submitted at any stage in the processing of the charges until the court-martial convening authority's final action on the case. Commanders will also ensure that a member will not be coerced into submitting a request for discharge in lieu of trial by court-martial. The member will be given a reasonable time (not less than 72 hours) to consult with a consulting counsel and to consider the wisdom of submitting such a request for discharge.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. An under other than honorable discharge is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct and in lieu of trial by court-martial.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to

Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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 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//