

IN THE CASE OF: ██████████

BOARD DATE: 7 December 2023

DOCKET NUMBER: AR20230004679

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

APPLICANT'S SUPPORTING DOCUMENT 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 (USC), 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 apologizes for his misconduct, but he was young, and his noncommissioned officer leadership prevented him from ascending because he was stereotyped. He contends he signed the paperwork for a general discharge and was assured by an officer that it would be upgraded to an honorable discharge within 6 to 12 months. He desires an upgrade so he can be eligible to receive medical treatment for an injury he sustained while serving in the Army in 1999. His daily life has been impacted for the last 20 years because he has no use of his right thumb due to muscle failure, fatigue, and pain.
3. On 22 April 1998, the applicant enlisted in the Regular Army for a period of 3 years in the rank/pay grade of private/E-2. Upon completion of initial entry training, he was assigned to a unit at Fort Bragg, NC.
4. Changes in the applicant's duty status were reported as follows:
 - 10 September 1999 from Present for Duty (PDY) to AWOL
 - 10 October 1999 from AWOL to Dropped from Rolls (DFR)
 - 1 January 2000 from DFR to Returned to Military Control following his apprehension by civilian authorities

5. A DD Form 458 (Charge Sheet) shows on 16 February 2000, court-martial charges were preferred against the applicant for violation of Article 86 of the Uniform Code of Military Justice (UCMJ) for on or about 10 September 1999, without authority, absenting himself from his organization and remaining so absent until on or about 2 February 2000.
6. On 16 February 2000, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him. He elected not to submit a statement in his own behalf.
7. The applicant's immediate and intermediate commander recommended approval of his request with a discharge UOTHC.
8. On 29 March 2001, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced to the lowest enlisted grade.
9. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 25 April 2001, in the rank/grade of private/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of " In Lieu of Trial by Court-Martial." He was credited with completing 2 years, 7 months, and 9 days of net active service this period. He did not complete his first full term of service.
10. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.
11. On 11 July 2023, a member of the Army Review Boards Agency staff requested the applicant provide documentary evidence in support of his medical condition and afforded him a 30-day period to comply. To date, the applicant has not responded.
12. 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.

13. 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 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 24 April 2001 discharge characterized as under other than honorable conditions. He states:

“Because on separation from the Army, I signed my paperwork under general discharge. The officer told me it would change within six months to a year to honorable discharge. However, I have been injured in training in the year '99 and still dealing with my injury to this day. I am asking for help with the complications it has caused me in my daily life.

I have no use of my right thumb section, muscle failure , fatigue and pain for the last 20 years since separation. I apologize for my action but I was young and the system as in, the higher ups enlisted men prevented me from climbing because I was being stereotyped. But I ask for forgiveness and my status of discharge to be changed.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 22 April 1998 and was discharged on 25 April 2001 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (1 November 2000): Discharge in Lieu of Trial by Court-Martial. The DD 214 shows lost time under 10 USC § 972 from 10 September 1999 thru 1 February 2000 (145 days). There were no periods of service in a hazardous duty pay area.

d. A Charge Sheet (DD form 458) shows the applicant was charged with absent without leave (AWOL) from 10 September 1999 thru 2 February 2000. The Report of Return of Absentee (DD Form 616) show the applicant had been apprehended by civilian authorities in Charleston, South Carolina.

e. On 10 February 2000, the applicant voluntarily requested discharge in lieu of trial by court-marital under chapter 10 of AR 635-200.

f. The commander of the United States Army Garrison, Fort Knox, Kentucky approved his request on 29 March 2001. He directed the applicant be discharged with an under other than honorable characterization of service and be reduced in rank to Private E1 prior to the execution of the discharge.

g. No medical documentation was submitted with the application. There are no encounters in AHLTA or in JLV.

h. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his UCMJ violation; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge.

i. It is the opinion of the ARBA medical advisor that neither a discharge upgrade nor a referral to the Disability Evaluation System is warranted.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, 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 an in-service injury 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 medical or mental health condition. Based on a preponderance of the 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.

2/12/2024

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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, 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.

3. 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 regulation provides that 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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.

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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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; 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.

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.

//NOTHING FOLLOWS//