

IN THE CASE OF: ██████████

BOARD DATE: 14 December 2023

DOCKET NUMBER: AR20230004858

APPLICANT REQUESTS: an upgrade of his character of service from under other than honorable conditions to under honorable conditions (general) and a personal appearance hearing via video or telephone.

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States 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 was a good Soldier and did his job well. He had a problem with alcohol, which caused him to miss or be late for duty. Additionally, his application to the Board notes his request is related to other mental health issues.
3. The applicant's record is not available for review. However, the applicant did provide the Board with a copy of a DD Form 214 (Report of Separation from Active Duty) for the period ending 10 February 1978, which is sufficient to conduct a fair and impartial review of this case.
4. The applicant enlisted in the Regular Army on 15 October 1976.
5. The available documentation is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, His DD Form 214 shows:
  - a. He was discharged on 10 February 1978, in accordance with chapter 14 of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel) with an under other than honorable conditions character of service.

b. His DD Form 214 also show he completed 1 year, 1 month, and 19 days of net active service and had two periods of lost time from 15 August 1977 to 28 September 1977 and from 28 November 1977 to 20 December 1977.

6. Regulatory guidance provides Soldiers may be separated under the provisions of AR 635-200, chapter 14 for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. An under other than honorable conditions character of service in normally considered appropriate.

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

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his character of service from under other than honorable conditions to under honorable conditions (general). The applicant asserted other mental health as a mitigating factor in his misconduct and request for upgrade.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the Regular Army on 15 October 1976.
- The available documentation is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing.
- His DD Form 214 shows that he was discharge on 10 February 1978, in accordance with AR 635-200, chapter 14, with an under other than honorable conditions discharge.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), and his DD Form 214. His service record and separation documentation were not available for review. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserted that he had a problem with alcohol, missed formation and reported late for duty. The applicant is requesting an upgrade, with other mental health

(alcohol use concerns) as a mitigating factor. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents, nor his service treatment records (STR) were available for review. No other records were provided to substantiate his assertion.

e. Per the applicant's VA EHR, he is not service connected. He has not been engaged in any mental health care through the VA and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health encounters. No other medical records were provided.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience at the time of service. If a mitigating condition were present, this Agency Behavioral Health Advisor would not be able to provide an opine regarding an upgrade without documentation of the specific misconduct that led to his discharge.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant asserts other mental health.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts other mental health (alcohol use issues) were present during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, with caution given missing service and separation records. The applicant asserted other mental health mitigated his discharge. More specifically, the applicant asserted that an "alcohol problem" was the condition he believes mitigates his discharge. First and foremost, any substance use disorder, as a standalone diagnosis, is not currently a mitigating condition. Second, the applicant did not provide any service records or medical records that substantiated his assertion that any mental health condition, to include a substance use disorder, was present during his time in service. However, per Liberal Consideration guidance, the applicant's assertion is sufficient to warrant the board's consideration. That said, if substance use were to be consider as a potentially mitigating condition, this advisor could not fully opine without documentation of the specific misconduct that led to his discharge.

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, 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 that included two periods of lost time, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA BH 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 there being insufficient documentation to determine if his misconduct was mitigated by a 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.

2/15/2024

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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 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 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 of this regulation in effect at the time, 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, and conviction by civil authorities. Section II - Paragraph 14-5, further states; action would be taken to separate a member when convicted by civil authorities, or action is taken which is tantamount to a finding of guilty; and when a punitive discharge would be authorized for the same or a closely related offense under the MCM; or when

a member was sentenced to confinement of six months or more by civil authorities. An under other than honorable conditions (UOTHC) discharge was normally considered appropriate. However, the separation authority could direct an under honorable conditions (general) discharge if merited by the Soldier's overall record.

3. 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 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.

4. Section 1556 of Title 10, United States Code, 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.

5. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicant's 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//