

IN THE CASE OF: ██████████

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230005441

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service.

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

DD Form 149 (Application for Correction of Military Record), 1 March 2023

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 Number AR20130015813 on 23 April 2014.
2. The applicant states he was wrongfully incarcerated and was charged with 22 crimes he did not commit. His case was overturned in 1982; however, this ruined his career. He is very proud to have served his country and requests a positive response for his discharge. The applicant notes other mental health is related to his request.
3. The applicant enlisted in the Regular Army on 23 April 1980, for a 3-year period. He was awarded the military occupational specialty of 13B (Cannon Crewman).
4. Court-martial charges were preferred against the applicant on 28 January 1981, for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with one specification of stealing property and currency from a Soldier on or about 21 December 1980.
5. General Court-Martial (GCM) Order Number 31, adjudged on 13 April 1981 shows the applicant was arraigned and tried for the following:
 - a. Charge I, violating Article 122 of the Uniform Code of Military Justice (UCMJ), by using means of force and violence, and putting him in fear, stealing from another Soldier, against his will, his wallet containing personal papers and \$25.00 in U.S. currency on or about 21 December 1980.

- b. He plead not guilty to the specification and charge and was found guilty.
 - c. He was sentenced to be dishonorably discharged, forfeiture of all pay and allowances, and confinement at hard labor for 1 year and 9 months. The sentence was approved on 21 May 1981.
6. The record of trial was forwarded for appellate review, the findings of guilty and sentence were affirmed on 18 June 1982.
7. The applicant consulted with legal counsel on 17 September 1982 and executed a written request for discharge for the good of the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10 (Discharge for the Good of the Service). He acknowledged his understanding of the following in his request:
 - a. He understood that he could request discharge for the good of the service because the charges preferred against him could result in the imposition of a punitive discharge.
 - b. Prior to completing this request, he was afforded the opportunity to consult with appointed counsel, who fully advised him of the basis for his contemplated trial by court-martial, the maximum punishment authorized under the UCMJ, of the possible effects of an under other than honorable conditions character of service, and of the procedures and rights available to him.
 - c. He acknowledged that he was making this request of his own free will and had not been subjected to any coercion by any person. Although counsel furnished him legal advice, this decision was his own. Additionally, he elected not to submit a statement in his own behalf.
8. On 22 September 1982, the applicant's immediate and intermediate commanders recommended approval of the request for discharge for the good of the service, with a service characterization of UOTHC.
9. The separation authority approved the applicant's request for discharge in lieu of court-martial on 29 September 1982, and further directed the issuance a DD Form 794A (UOTHC Discharge Certificate).
10. On the same date, General Court-Martial Order Number 377, issued by Headquarters, U.S. Army Combined Arms Center and Fort Leavenworth, Kansas, shows on 18 June 1982, the finding of guilty and the applicant's sentence was set aside, and a rehearing was authorized. The applicant's request for discharge for the good of

the service having been approved on 29 September 1982, a rehearing was no longer practicable.

11. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 12 October 1982, under the provisions of AR 635-200, Chapter 10, for the good of the service, in the grade of E-1. He received an UOTHC characterization of service, a separation code of JFS and reenlistment code of RE-3B. He was credited with 1 year and 20 days of net active service with time lost from 22 January 1981 to 21 June 1982.

12. On 23 April 2014, the ABCMR considered the applicant's request for an upgrade of his characterization of service. The Board denied his request stating the evidence presented did not demonstrate the existence of a probable error or injustice. The Board determined that the overall merits of the case were insufficient as a basis for the correction for his records.

13. Discharges under the provisions of Army Regulation 635-200, Chapter 10, are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

14. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced mental health conditions 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 23 April 1980; 2) Court-martial charges were preferred against the applicant on 28 January 1981 for stealing property and currency from a Soldier. On 13 April 1981, the applicant was arraigned, tried, and found guilty of using means of force and violence, and putting him in fear, and stealing from another Soldier his wallet containing personal papers and \$25.00; 3) The applicant was discharged on 12 October 1982, Chapter 10, for the good of the service. He received an UOTHC characterization of service; 4) On 23 April 2014, the ABCMR considered and denied the applicant's request for an upgrade of his 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) was also examined. No additional medical documentation was provided.

d. On his application, the applicant contends mental health conditions were contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant ever reported or was diagnosed with a mental health condition while on active service. A review of JLV was void of mental health documentation, and the applicant receives no service-connected disability. The applicant did not provide any additional medical documentation from a licensed behavioral health provider.

e. 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 mental health conditions that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions that contributed to his misconduct 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. In addition, there is no nexus between his reported mental health condition and his misconduct of using means of force and violence, and putting him in fear, and stealing another Soldier's property and money: 1) these types of misconduct are not part of the natural history or sequelae of his reported mental health conditions; 2) His reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant’s request, supporting documents, evidence in the records, and published DoD guidance on consideration of discharge upgrade requests. The Board noted the multiple offenses leading to the applicant’s separation. Documentation shows he was afforded counsel and voluntarily requested discharge for the good of the service in accordance with applicable regulatory guidance. He declined to submit a statement in his own behalf. After due consideration of the request and, in the absence of any mitigating factors such as post-service accomplishments or letters of reference to weigh in favor of the request, the Board found that 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 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 to amend the decision by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20130015813 on 23 April 2014.

2/26/2024

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CHAIRPERSON

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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. Section 1556 of Title 10, U.S. Code (USC), 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.
2. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.
 - 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.
3. 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. 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.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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//