

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230005606

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 293 (Application for the Review of Discharge) (duplicate)
- Self-Authored Statement (three)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Character Letters (three)

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:

a. At the time of his discharge, being gay in the military was not allowed. He was subjected to a witch hunt in which he was harassed and discriminated against by members of his unit, which culminated in his arrest. During his arrest, he was pressured to give up the names of other gay service members in exchange for an honorable discharge. However, he refused to do so on principle, as it went against his beliefs and values. This discharge and the subsequent harassment he faced were unjust and discriminatory, and they have had a lasting impact on his life. However, he has shown resilience and determination in rebuilding his life and becoming the person he is today. He believes it is only proper, equitable, and just that the Board grants his request for a change in discharge status. Such a change would help to correct past injustices, restore his honor and dignity, and provide him with greater access to benefits, opportunities, and resources that have been denied to him due to his previous discharge status.

b. Character letters state the applicant was discharged due to his sexual orientation and attest to him making positive changes and advocating for those who were unable to

advocate for themselves. He is dependable, reliable, and engaged. He is an exemplary employee who demonstrates leadership, commitment to cause, dedication to service, and executing his duties within every detail of his assigned tasks.

3. The applicant enlisted in the Regular Army on 28 December 1981 for three years. His military occupational specialty was 94B (Food Service Specialist).
4. The applicant served in Germany from 21 May 1982 through 8 November 1983.
5. A Military Police (MP) Report, dated 10 July 1984, shows the applicant was one of a group of people, not registered guests, who were found swimming naked in the motel jacuzzi. He was arrested for criminal trespassing and transported to jail.
6. The applicant was counseled between 10 July and 5 November 1984 for criminal trespassing, missing formation, non-promotion counseling, and failure to report for duty (twice).
7. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on 8 November 1984 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 5 November 1984 and without authority, absenting himself from his place of duty (AWOL) on or about 2 November 1984 until on or about 3 November 1984. His punishment consisted of reduction to private first class/E-3, forfeiture of \$171 pay for one month, and extra duty.
8. The applicant was AWOL on 9 January 1985 and dropped from the rolls.
9. MP Report, dated 28 January 1985, shows the applicant was apprehended and transported to Fort Bragg, NC.
10. Court-martial charges were preferred against the applicant on 22 March 1985 for violations of the UCMJ. His DA Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 9 January 1985.
11. The applicant was apprehended by civil authorities, processed, and later transported and released to his unit on or about 11 June 1985.
12. An updated charge sheet shows court-martial charges were preferred against the applicant on 19 June 1985 for violations of the UCMJ. He was charged with AWOL from on or about 9 January 1985 to 11 June 1985.
13. The applicant consulted with legal counsel on 28 June 1985 and was advised of the basis for the contemplated trial by court-martial for an offense punishable by a bad conduct discharge or a dishonorable discharge, the maximum permissible punishment

authorized under the UCMJ, the possible effects of a request for discharge, and of the procedures and rights available to him.

a. Subsequent to consultation with legal counsel, he requested discharge under the provisions of Army Regulation 635-200 (AR) (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service-in lieu of trial by court-martial. In his request for discharge, he indicated he was making the request of his own free will and he had not been subjected to any coercion whatsoever by any person. He understood by requesting discharge he was admitting guilt to the charges against him or of a lesser included offense that also authorized the imposition of a bad conduct discharge or a dishonorable discharge.

b. He understood that a physical examination was not required, but that he may request one. He acknowledged he understood if his discharge request was approved, he could be deprived of many or all Army benefits and he could be ineligible for many, or all benefits administered by the Veterans Administration; he acknowledged he could be deprived of his rights and benefits as a veteran under both Federal and State laws if he was given an UOTHC discharge.

c. He did not elect to submit statements in his own behalf.

14. The applicant's commander recommended approval on 10 July 1985 and noted the gravity of the applicant's offense was sufficiently serious to warrant elimination from the service and recommended an UOTHC discharge.

15. The separation authority approved the applicant's request for discharge on 15 July 1985, and directed the applicant be reduced to the lowest enlisted grade and that his character of service be UOTHC.

16. The applicant was discharged on 5 August 1985. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service-in lieu of court martial. He was assigned Separation Code KFS and Reenlistment Code 3, 3B, and 3C. His service was characterized as UOTHC. He completed 3 years, 2 months, and 10 days of net active service. He lost time from 9 January 1985 to 6 June 1985. He was awarded or authorized the: Army Service Ribbon, Army Achievement Medal, Overseas Service Ribbon, and the Army Good Conduct Medal.

17. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

18. The applicant provides a copy of his DD Form 214 as discussed above and a self-authored letter that describes his post service accomplishments, education,

volunteerism, and work history. He states he cannot be buried under the U.S. flag that he loves and respects so dearly due to his discharge status.

19. 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.

20. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting his under other than honorable conditions (UOTHC) discharge be upgraded. He contends he experienced discrimination related to his sexual orientation 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 was enlisted in the Regular Army on 28 December 1981; 2) A Military Police Report, dated 10 July 1984, shows the applicant was one of a group of people, not registered guests, who were found swimming naked in the motel jacuzzi. He was arrested for criminal trespassing and transported to jail; 3) The applicant accepted nonjudicial punishment on 8 November 1984 for failing to go at the time prescribed to his appointed place of duty 5 November 1984 and being AWOL from 2-3 November 1984; 4) Court-martial charges were preferred against the applicant on 19 June 1985 for being AWOL from 9 January to 11 June 1985; 4) The applicant was discharged on 5 August 1985, Chapter 10, for the good of the service-in lieu of court martial. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted discrimination related to sexual orientation as a contributing and mitigating factor in the circumstances that resulted in his separation. There was insufficient evidence the applicant reported mental health symptoms while on active service. The applicant was not discharged for homosexuality. A review of JLV was void of medical documentation, and the applicant did not indicate a mental health condition was a mitigating factor in his misconduct. The applicant has not been diagnosed with a service-connected mental health condition and receives no service-connected disability.

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 discrimination related to his sexual orientation that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing discrimination related to his sexual orientation 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 discrimination for his sexual orientation while on active service. The applicant did engage in various misconduct to include going AWOL, which can be a sequela to the experience of discrimination. However, this is not sufficient to establish a history of discrimination during active service. Yet, the applicant contends he was experiencing discrimination that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 discrimination claim and the review and conclusions of the ARBA Medical Advisor. The Board found the evidence of post-service achievements insufficient 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 being a victim of discrimination. 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.

4/24/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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 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, 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 (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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. 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 Service Discharge Review Boards (DRB) and Service 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.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service 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//