

IN THE CASE OF: ██████████

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230005818

APPLICANT REQUESTS:

- an upgrade of his under other than honorable condition (UOTHC) characterization of service to honorable
- a personal appearance hearing before the Board via video or telephone

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)
- Self-authored statement, undated

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:

a. The upper ranks of his command harassed him for not going Airborne, and before his discharge, he asked his command for guidance on reenlistment options instead of being discharged. He asked if he could reenlist and be deployed to the Gulf War or move to another command outside Fort Bragg, NC. However, his command denied his request and told him to have a nice life.

b. He believes if he had been allowed to reenlist and move away from his First Sergeant and the harassment he was going through, he would have continued to serve his country and retire from the Army. He notes harassment and post-traumatic stress disorder (PTSD) are related to his request.

3. The applicant enlisted in the Regular Army on 19 January 1988 for 4 years. The highest rank/grade he held was private first class/E-3.

4. A DA Form 4126-R (Bar to Reenlistment Certificate), dated 2 March 1989, shows that a day prior, the applicant received non-judicial punishment under Article 15, of the uniform Code of Military Justice (UCMJ), for violating Article 112a (Wrongful Use, Possession etc. of Controlled Substances). His punishment was reduction to E-2, forfeiture of \$300.00 pay per month for one month, and extra duty for 45 days.
5. The record contains a series of documents addressing the applicant's absent without leave (AWOL) status on two separate occasions:
 - a. Two DA Forms 4187 (Personnel Actions) show, effective 19 April 1989, the applicant's unit reported him AWOL. His duty status changed to present for duty when he surrendered to his company on 20 April 1989.
 - b. Two DA Forms 4187 show, effective 9 June 1989, the applicant's unit reported him AWOL, and on 9 July 1989 he was dropped from the rolls. His duty status changed to return to military control when he was apprehended by civilian authorities on 26 August 1990.
6. A memorandum for voluntary medical examination for separation, dated 30 August 1990, shows the applicant chose not to undergo a separation medical examination prior to separation.
7. On 31 August 1990, 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 9 June 1989 and did remain so absent until on or about 26 August 1990.
8. The applicant consulted with legal counsel on 31 August 1990.
 - a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the UCMJ, the possible effects of a under other than honorable conditions (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 elected not to submit a statement in his own behalf.

9. On 20 September 1990, the immediate commander recommended approval of the applicant's request for discharge and the issuance of a discharge UOTHC.

10. On 27 September 1990, a 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.

11. On the same day, 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.

12. The applicant was discharged accordingly on 16 October 1990, under the provisions of AR 635-200, Chapter 10, for the good of the service - in lieu of trial by court-martial, with an UOTHC characterization of service in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries:

a. He completed 1 year, 6 months, and 9 days of net active service during the period covered.

b. Block 18 (Remarks) the entry "EXCESS LEAVE CREDITABLE FOR ALL PURPOSES EXCEPT PAY AND ALLOWANCES 900831 - 901016"

c. Block 29 (Dates of Time Lost During This Period): 19 April 1989 to 20 April 1989 and 9 June 1989 to 26 August 1990.

13. 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.

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

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable condition (UOTHC) characterization of service to honorable. He selected PTSD and harassment on his application as related to his request.

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 RA on 19 January 1988.
- DA Form 4126-R (Bar to Reenlistment Certificate), dated 2 March 1989, shows the applicant received non-judicial punishment under Article 15, of the uniform Code of Military Justice (UCMJ), for violating Article 112a (Wrongful Use, Possession etc. of Controlled Substances).
- Two DA Forms 4187 (Personnel Actions) show, effective 19 April 1989, the applicant's unit reported him AWOL. His duty status changed to Present for duty when he surrendered to his company on 20 April 1989.
- Two DA Forms 4187 show, effective 9 June 1989, the applicant's unit reported him AWOL, and on 9 July 1989 he was dropped from the rolls. His duty status changed to return to military control when he was apprehended by civilian authorities on 26 August 1990.
- On 31 August 1990, 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 9 June 1989 and did remain so absent until on or about 26 August 1990.
- Applicant was discharged on 16 October 1990, under the provisions of AR 635-200, Chapter 10, for the good of the service - 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 a reentry code "RE-3."

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, DD Form 293, DD Form 214, self-authored statement, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. 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 states the upper ranks of his command harassed him for not going Airborne, and before his discharge, he asked his command for guidance on reenlistment options instead of being discharged. He asked if he could reenlist and be deployed to the Gulf War or move to another command outside of Fort Bragg, NC. However, his command denied his request and told him to "have a nice life". He believes had he been allowed to reenlist and move away from his First Sergeant and the harassment he was going through, he would have continued to serve his country and retired from the Army. He notes harassment and Post-Traumatic Stress Disorder (PTSD) as related to his request.

e. Due to the period of service, no active-duty electronic medical records were available for review. A Memorandum for voluntary medical examination for separation, dated 30 August 1990, show the applicant chose not to undergo a separation medical examination prior to separation. The VA electronic medical records available for review indicate the applicant has been treated by the VA since July 2011 for medical issues. During that time, he has not requested or received any mental health services, and the applicant is not service connected. In addition, the ARBA Case Management Division contacted the applicant via letter dated 16 June 2023, requesting he provide a copy of the medical documents that supports his assertion of Post-Traumatic Stress Disorder (PTSD). The applicant did not submit any medical documentation substantiating his self-assertion of PTSD.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. However, per Liberal Consideration guidelines, applicant's endorsement of PTSD and harassment, as related to his request, merits consideration by the board.

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 a mitigating condition on his application.

(2) Did the condition exist or experience occur during military service? Yes. The applicant self-asserts PTSD and harassment as related to his request.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH conditions. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant self-asserts PTSD and harassment as related to his request, he did not provide any medical documentation evidencing a BH diagnosis.

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, 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 PTSD 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 evidence of any mitigating behavioral health conditions. 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.

2/27/2024

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, 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.

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 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.

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//