

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 January 2024

DOCKET NUMBER: AR20230006757

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded to under honorable conditions(general). Additionally, he requests an appearance before the board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 was being sexually assaulted; at the time he did not know what to do. He has been living with this and this is why he left the way he did. He was embarrassed and this affected his marriage and family.
3. The applicant's military records are not available for review in this case. The National Personnel Records Center - Military Personnel Records was unable to locate the applicant's military records upon request. However, the available DD Form 214 is sufficient to conduct a fair and impartial review of this case.
4. The applicant enlisted in the Regular Army on 1 April 1986. His military occupational specialty was 13B (Cannon Crewmember).
5. He had lost time from 23 March 1989 through 24 March 1989.
6. The applicant was discharged on 28 August 1989. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service-in lieu of trial by court martial. He was assigned Separation Code KFS and Reenlistment Code 3B,

3C. His service was characterized as UOTHC. He completed 3 years, 2 months, and 26 days of net active service. His awards include the: Army Service Ribbon, Air Assault Badge, and the Air Force Training Ribbon.

7. The issuance of a discharge under the provisions of Army Regulation 635-200, Chapter 10, required the applicant to have requested from the Army – voluntarily, willingly, and in writing – discharge in lieu of trial by court-martial. It is presumed that all requirements of law and regulation were met, and the rights of the applicant were fully protected throughout the separation process. No evidence that would indicate the contrary was provided.

8. On 4 October 2023, in the processing of this case the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Military Police Reports regarding Sexual Assault pertaining to the applicant.

9. 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.

10. MEDICAL REVIEW:

a. Background: The applicant is requesting his under other than honorable conditions (UOTHC) discharge be upgraded to under honorable conditions (general). The applicant asserted that an MST mitigates his discharge.

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:

- The applicant's military records are not available for review in this case. The National Personnel Records Center - Military Personnel Records was unable to locate the applicant's military records upon request. However, the available DD Form 214 is sufficient to conduct a fair and impartial review of this case.
- Applicant enlisted in the Regular Army on 1 April 1986.
- He had lost time from 23 March 1989 through 24 March 1989.
- The applicant was discharged on 28 August 1989. His DD Form 214 shows he was discharged under AR 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service-in lieu of trial by court martial. His service was characterized as UOTHC.

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), his DD Form 214, and some of his service record. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV), though no records were present. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserted that he was being sexually assaulted and at the time did not know what to do. He noted "this is why I left the way I did," as he noted being embarrassed and that it affected his marriage and family. 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 did not contain his service treatment records (STR). A request for information from CID did not produce any records or data about the applicants asserted MST. No other records were provided to substantiate his claim.

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 not have any "Community Health Summaries and Documents" available for consideration.

f. It is the opinion of the Agency Behavioral Health Advisor that there is no evidence, outside of self-report, that the applicant had a mitigating experience. However, it is not uncommon for there to be no record of sexual assault. In addition, after reviewing the application and all supporting documents, this Agency Behavioral Health Advisor cannot provide a full opine regarding mitigation 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 an MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts an MST occurred during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unable to opine. The applicant asserted sexual assault as a mitigating factor in his misconduct and discharge. First, the only evidence of sexual assault is the applicant's assertion in his application. However, given the period of service and the nature of what he is asserting, it is not uncommon for victims to have not reported it. Hence, per Liberal Consideration guidance, his contention is sufficient to warrant the boards consideration.

Second, the applicant's service record and separation packet were not available for review. The applicant noted having "left the way" he did, which indicates he may have gone AWOL. There is a nexus between avoidance behaviors (such as going AWOL) and sexual assault, particularly to escape or avoid a perpetrator. However, without documentation of the specific misconduct that led to his discharge, a full opine regarding mitigation cannot be provided.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's complete separation packet is not available for review. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Other evidence shows the applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, the applicant presumably consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the misconduct. Additionally, the applicant does not provide evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : 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.

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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. 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. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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 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.

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 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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//