

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230006965

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service to under honorable conditions (general). Additionally, he requests an appearance 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) with self-authored statement

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, in effect, upon arriving to his unit at Fort Bragg, NC, he was witnessed kissing another man. He was beaten over several nights. He was ignored when he sought the assistance of his chain of command. He went absent without leave (AWOL). When he turned himself in, he was sent for retraining. He was returned to the same unit, where he was severely beaten many more times. He went AWOL again. Prior to these events, he was a standout Soldier who graduated from jump school with zero incidents. He was only 17 years old at the time. The applicant notes sexual assault/harassment as conditions related to his request.
3. The applicant enlisted in the Regular Army on 13 May 1980 for a 3-year period. Upon the completion of initial entry training, he was awarded military occupational specialty 11B (Infantryman).
4. Four DA Forms 4187 (Personnel Actions) show the following changes in the applicant's duty status:
 - 10 October 1980 - AWOL
 - 20 October 1980 - willfully returned to unit

- 24 October 1980 - AWOL
- 23 November 1980 - dropped from the rolls
- 5 June 1981 - surrendered to military authorities at Kirkland Air Force Base, NM

5. Before a summary court-martial at Fort Sill, OK, on 2 July 1981, the applicant pled guilty to and was found guilty of being AWOL, from on or about 24 October 1980 until on or about 5 June 1981. He was sentenced to forfeit \$334.00 pay and 60 days of restriction. The sentence was approved and ordered executed on 2 July 1981.

6. Four additional DA Forms 4187 show the following changes in the applicant's duty status:

- 31 August 1981 - AWOL
- 16 September 1981 - arrested and confined by civilian authorities on charges of a stolen vehicle and AWOL in Mattoon, IL
- 17 September 1981 - transferred and confined by military authorities at Fort Sheridan, IL
- 18 September 1981 - AWOL from return flight to Fort Bragg, NC

7. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL from on or about 31 August 1981 until on or about 16 September 1981 and from on or about 18 September 1981 and he continued to remain so at the time the charge sheet was initiated.

8. A DA Form 4187 shows the applicant was apprehended by civilian authorities and returned to military control at San Francisco, CA, on 20 August 1982.

9. Court-martial charges were preferred against the applicant for a violation of the Uniform Code of Military Justice. The relevant DD Form 458 shows he was charged with being AWOL from on or about 18 September 1981 until on or about 20 August 1982.

10. The applicant consulted with legal counsel on 8 September 1982.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, for the good of the service, under the provision of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged his

understanding that 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 or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding that if his discharge request were 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 was advised he could submit any statements he desired in his own behalf. He elected not to submit a statement.

11. On 14 September 1982, the applicant's immediate commander recommended approval of the request for discharge for the good of the service and further recommended the issuance of an UOTHC discharge. The commander stated [the applicant] went AWOL because of problems within his unit. He no longer desired to remain in the service. If he was returned to duty, he would go AWOL again.

12. The applicant's intermediate commanders recommended approval of the request for discharge for the good of the service with the issuance of a UOTHC discharge.

13. The separation authority approved the applicant's request for discharge on 6 October 1982 and directed the issuance of a UOTHC Discharge Certificate.

14. Accordingly, the applicant was discharged on 26 October 1982, under the provisions of Army Regulation 635-200, Chapter 10, by reason of administrative discharge - conduct triable by court-martial. His DD Form 214 (Certificate of Release of Discharge from Active Duty) confirms his service was characterized as UOTHC, with separation code JFS and reenlistment code RE-3, 3B, 3C. He was credited with 9 months and 12 days of net active service, with lost time from 10 October 1980 to 19 October 1980, 24 October 1980 to 4 June 1981, 31 August 1981 to 16 September 1981, and 18 September 1981 to 19 August 1982.

15. On 15 August 2023, the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Military Police Reports pertaining to the applicant.

16. 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.

17. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

18. MEDICAL REVIEW:

a. The applicant requests and upgrade of his UOTHC to under honorable conditions, general. He contends his misconduct was related to MST.

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 into the Regular Army on 13 May 1980; 2) Before a summary court-martial at Fort Sill, OK, on 2 July 1981, the applicant pled guilty to and was found guilty of being AWOL, from on or about 24 October 1980 until on or about 5 June 1981; 3) Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL from on or about 31 August 1981 until on or about 16 September 1981 and from on or about 18 September 1981 and he continued to remain so at the time the charge sheet was initiated; 4) Court-martial charges were preferred against the applicant for a violation of the Uniform Code of Military Justice. The relevant DD Form 458 shows he was charged with being AWOL from on or about 18 September 1981 until on or about 20 August 1982; 5) The applicant consulted with legal counsel on 8 September 1982 and after receiving legal counsel, voluntarily requested discharge, for the good of the service, under the provision of Army Regulation 635-200, Chapter 10; 6) The separation authority approved the applicant's request for discharge on 6 October 1982 and directed the issuance of a UOTHC Discharge Certificate Accordingly; 7) Accordingly, the applicant was discharged on 26 October 1982, under the provisions of Army Regulation 635-200, Chapter 10.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. No military BH-related records were provided for review. A review of JLV was void of any BH treatment history and the applicant does not have a SC disability. No civilian BH records were provided for review.

d. The applicant asserts his misconduct was related to MST characterized by physical assault by other Soldiers secondary to the applicant being seen kissing another man. A review of the records was void of any BH history for the applicant during or after service and he provided no documentation supporting his assertion of MST. Additionally, a memorandum from the Army CID, dated 15 August 2023, found no MST reports associated with the applicant. In absence of evidence supporting the applicant's assertion, there is insufficient evidence to support his misconduct, characterized by multiple instances of AWOL, was related to, or mitigated by MST and therefore insufficient evidence to support an upgrade of his discharge characterization.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, the applicant asserts his

misconduct was related to MST, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

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 contends his misconduct was related to MST.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts his misconduct was related to MST characterized by physical assault by other Soldiers secondary to the applicant being seen kissing another man. A review of the records was void of any BH history for the applicant during or after service and he provided no documentation supporting his assertion of MST. Additionally, a memorandum from the Army CID, dated 15 August 2023, found no MST reports associated with the applicant. In absence of evidence supporting the applicant's assertion, there is insufficient evidence to support his misconduct, characterized by multiple instances of AWOL, was related to, or mitigated by MST and therefore insufficient evidence to support an upgrade of his discharge characterization.

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 Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he 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 provided no 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. Section 1556 of Title 10 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.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides the ABCMR may, in its discretion, hold a hearing. 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. Army Regulation 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.

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 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.

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 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//