

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230007058

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 he was drugged and cannot confirm who his assailant(s) were. When he was younger, he did not put it together that he had been assaulted. There should be a medical record of him visiting a physician on base for strange anal bumps.
3. The applicant enlisted in the Army National Guard (ARNG) on 19 September 1996. He entered active duty for training on 6 November 1996 and was released for completion of required active service on 26 April 1997.
4. He enlisted in the Regular Army on 5 November 1997.
5. On 7 August 1998, court-martial charges were preferred against the applicant for the following violations:
 - forgery of a check
 - larceny of a value of about \$900.00
 - stealing U.S. currency of a value of \$900.00
 - two specifications of intention to defraud
6. On 8 October 1998, the applicant, through counsel, submitted a voluntary request for discharge in lieu of trial by court-martial under Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. He understood that he may

request discharge because of the charges which have been preferred against him under the Uniform Code of Military Justice (UCMJ), one of which or a combination of which authorizes the imposition of a bad conduct or dishonorable discharge (Larceny).

- he was making the request of his own free will and had not been subjected to any coercion whatsoever by any person
- he was advised of the implications that are attached to it
- by submitting the request, he acknowledged that he understood the elements of the offense charged and is guilty of the charge against him
- under no circumstances did he desire further rehabilitation, for he had no desire to perform further military service
- he understood he may be discharged under conditions other than honorable
- he would be deprived of many or all Army benefits and that he may be ineligible for many or all benefits administered by the Veterans Administration and he may be deprived of his rights and benefits as a veteran under both Federal and State law
- he indicated a statement in his own behalf would be submitted with his request; however it is unavailable for the Board to review

7. On 15 October 1998, the separation authority approved the applicant's separation under the provisions of AR 635-200, Chapter 10. He directed that the applicant be issued an under other than honorable conditions discharge. All court-martial charges against the applicant were dismissed.

8. On 13 November 1998, the applicant was discharged accordingly. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year and 9 days of active service. It shows he was awarded or authorized the Army Service Ribbon and Marksman Marksmanship Qualification Badge with Rifle Bar. It also shows in:

- item 24 (Character of Service): Under Other Than Honorable Conditions
- item 25 (Separation Authority): AR 635-200. Chapter 10
- item 26 (Separation Code): KFS
- item 27 (Reentry Code): 3
- item 28 (Narrative Reason for Separation): in lieu of trial by court-martial

9. By regulation, a Soldier who has committed an offense or offenses, the punishment for which, under the UCMJ includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged for the good of the service. However, the separation authority may direct a General Discharge Certificate, if such is merited by the Soldier's overall record during the current enlistment.

10. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 13 November 1998 discharge characterized as under other than honorable conditions. On his DD Form 293, he indicated that sexual assault/harassment is related to his request. He states in part:

"I wanted to try to see if any consideration could be given to me. I was drugged and can't confirm show my assailant(s) were. When I was younger, I didn't put it together that could have been assaulted. There should be a medical record of me visiting a physician on base for strange anal bumps."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of service of consideration shows he entered the regular Army on 5 November 1997 and was discharged with an under other than honorable conditions characterization of service on 13 November 1998 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (26 June 1996): Discharge in Lieu of Trial by Court-Martial. The DD 214 shows no periods of Service in a hazardous duty pay area or periods of lost time under 10 USC § 972.

d. On 8 October 1998, the applicant voluntarily requested discharge in lieu of trial by court-martial under chapter 10 of AR 635-200 due to his pending charge for larceny and related UCMJ violations. On 15 October 1998, the Commanding General of the 4th Infantry Division (Mechanized) approved his discharge request with an under other than honorable characterization of service.

e. No medical documentation was submitted with the application and there are no encounters in AHLTA or JLV.

f. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his UCMJ violation; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant claims sexual assault / harassment

(2) Did the condition exist or experience occur during military service? Applicant claims the sexual assault / harassment occurred while he was in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? No.

g. There was no probative evidence submitted, found in AHLTA or other electronic records, or in JLV (to include VA endorsement), for military sexual trauma (MST) or a behavioral health disorder of any kind. Under liberal consideration, however, the applicant's self-assertion of MST is sufficient to establish that MST occurred.

h. However, the resulting behavioral health disorder does not prevent a person from telling right from wrong and adhering to the right. Thus, it cannot mitigate the larceny and related offences for which he was administratively separated.

BOARD DISCUSSION:

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 noted the medical advisor's review on mitigation; however, based on a preponderance of the evidence, the Board determined the characterization 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.

[Redacted Signature]

[Redacted Name]

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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribes the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Paragraph 3-7b (General Discharge) states 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 (Discharge for the Good of the Service) states a Soldier who has committed an offense or offenses, the punishment for which, under the UCMJ includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged for the good of the service. However, the separation authority may direct a General Discharge Certificate, if such is merited by the Soldier's overall record during the current enlistment.
3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.
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 DRBs and BCM/NRs 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, on those conditions or experiences. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

6. Section 1556 of Title 10, United States Code, 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.

//NOTHING FOLLOWS//