

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 February 2024

DOCKET NUMBER: AR20230007069

APPLICANT REQUESTS:

- an upgrade of his general, under honorable conditions characterization of service
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum, subject: Separation Under Army Regulation (AR) 135-178 (Enlisted Administrative Separations), Chapter 12 (Misconduct), 12 September 2004
- Orders 05-220-00124, Discharge Orders from the U.S. Army Reserve (USAR), 8 August 2005
- letter, National Personnel Records Center (NPRC), 31 January 2013

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 at the time of his enlistment, he was battling his sexuality of being a black, gay male and he faced mental and physical health issues. During the time of "Don't Ask, Don't Tell," (DADT), he stressed about being gay, being in an environment that did not embrace who he was, worked in fear of not being accepted, and feared not being able to move up in his military career. He internalized trauma and shame that led him to make decisions that were not beneficial for him nor his future. He was ashamed and scared which led him to consistently miss drill days and he was subsequently discharged. He had no one to talk to and it still affects him today. He is hopeful this step will facilitate him getting the help he needs. The applicant also marked post-traumatic stress disorder and other mental health as other conditions related to his request.

3. The applicant provides a letter from NPRC, dated 31 January 2013, which notified the applicant they provided all documents available in their electronic storage system and any additional documents should be requested from U.S. Army Human Resources Command.

4. A review of the applicant's service record shows:

a. He enlisted in the USAR on 12 September 2002.

b. The applicant's service record is void of the facts and circumstances surrounding his discharge. However, the applicant provided a memorandum from his immediate commander, dated 12 September 2004, which shows the commander reviewed the documentation provided by the unit regarding the proposed separation of the applicant under the provisions of AR 135-178, Chapter 12 and recommended the applicant be separated with a general discharge under honorable conditions.

c. Orders 05-220-00124, dated 8 August 2005, discharged the applicant from the USAR with an under honorable conditions (General) characterization of service with an effective date of 8 September 2005. The authority reflected on the orders shows AR 135-178.

5. On 29 September 2023, the applicant was notified by the Army Review Boards Agency that he was required to provide a copy of medical documentation to support his claims. The applicant was provided 30 days to submit supporting documentation with a suspense of 29 October 2023. The applicant has not provided a response to date.

6. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

7. By regulation (AR 135-178), a Soldier may be discharged for misconduct when it is determined that the Soldier is unqualified for further military service by reason of one or more of the following circumstances:

- minor disciplinary infractions – a pattern of misconduct consisting solely of minor disciplinary infractions
- a pattern of misconduct – consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline.
- commission of a serious offense – a serious military or civilian offense, if the specific circumstances of the offense warrant discharge and a punitive discharge would be authorized for the same or a closely related offense under the Uniform Code of Military Justice (UCMJ)
- abuse of illegal drugs

8. 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 applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions, general discharge. He contends he experienced mental health conditions including PTSD that mitigated his misconduct. In addition, he reported difficulties as a result of the policy of "Don't Ask, Don't Tell" (DADT), which mitigated his discharge.

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 in the USAR on 12 September 2002; 2) The applicant's service record is void of the facts and circumstances surrounding his discharge. However, the applicant provided a memorandum from his immediate commander, dated 12 September 2004, which shows the commander reviewed the documentation provided by the unit regarding the proposed separation of the applicant under the provisions of AR 135-178, Chapter 12 and recommended the applicant be separated with a general discharge under honorable conditions; 3) The applicant was discharged on 8 August 2005 from the USAR with an under honorable conditions (General) characterization of service with an effective date of 8 September 2005.

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

d. On his application, the applicant noted other mental health conditions including PTSD and issues related to DADT were related to his request, as contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV was void of any behavioral health documentation, and the applicant receives no service-connected disability. The applicant did not provide any civilian medical documentation indicating he has been diagnosed with a mental health condition.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigate as the result of a mental health condition or experience. In addition, there is insufficient evidence the applicant has been diagnosed with a service-connected mental health condition.

However, the applicant contends he experienced negative consequences related to DADT. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A. There is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of a mental health condition or experience. In addition, there is insufficient evidence the applicant has been diagnosed with a service-connected mental health condition. However, the applicant contends he experienced negative consequences related to DADT. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

(2) Did the condition exist, or experience occur during military service? N/A

(3) Does the condition experience excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

1. The Board reviewed the application, all supporting documents, all statements, the evidence in the applicant's service records, the medical advisory provided by the ARBA Medical Advisor, and the published Department of Defense guidance pertaining to liberal consideration and the application of clemency.
2. The Board found insufficient evidence of in-service mitigating factors, in addition, there was insufficient evidence to show the applicant has been diagnosed with a service-connected physical or mental health condition. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. 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.
3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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, 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) 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.

3. AR 135-178 (Enlisted Administrative Separations), sets policies, standards, and procedures to ensure the readiness and competency of the U.S. Army while providing for the orderly administrative separation of Army National Guard of the United States (ARNGUS) and U.S. Army Reserve (USAR) enlisted soldiers for a variety of reasons.

a. An 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. If a soldier's service has been honest and faithful, it is appropriate to characterize that service as under honorable conditions. Characterization of service as general (under honorable conditions) is warranted when significant negative aspect of the Soldier's conduct or performance of duty outweighs positive aspects of the Soldier's military record.

c. Chapter 12 (Misconduct) states a Soldier may be discharged for misconduct when it is determined that the Soldier is unqualified for further military service by reason of one or more of the following circumstances:

- minor disciplinary infractions – a pattern of misconduct consisting solely of minor disciplinary infractions
- a pattern of misconduct – consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline
- commission of a serious offense – a serious military or civilian offense, if the specific circumstances of the offense warrant discharge and a punitive discharge would be authorized for the same or a closely related offense under the Uniform Code of Military Justice (UCMJ)
- abuse of illegal drugs

4. 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.

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 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.

6. 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.

7. 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//