

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 February 2024

DOCKET NUMBER: AR20230007105

APPLICANT REQUESTS: in effect -

a. correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to upgrade the following block entries:

- block 24 (Character of Service) from "under other than honorable conditions" to "honorable"
- block 25 (Separation Authority) from Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10 (Discharge in Lieu of Trial by Court-Martial) to AR 635-200, paragraph 5-3 (Secretarial plenary authority)
- block 26 (Separation Code) from KFS to KFF
- block 27 (Reentry Code) from 4 to 1
- block 28 (Narrative Reason for Separation) from In Lieu of Trial by Court-Martial to Secretarial Authority

b. a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel brief
- Counsel Supplemental Statement, 12 December 2020
- Incident Report, 7 March 2006
- U.S. Army Criminal Investigation Command letter, 12 March 2007
- Military Police Reports, March - April 2006
- Commander's Report of Disciplinary or Administrative Action, 26 April 2006
- Orders 135-0153, Separation order, 15 May 2006
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 17 May 2006
- letter, Freedom of Information Act (FOIA) request, 2 July 2018
- letter, Freedom of Information/Privacy Office, 3 July 2018
- ADRB letter to applicant, 18 January 2022

- Army Discharge Review Board (ADRB) letter to senator, 10 January 2023

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 seeks relief from other than honorable characterization of service based on confusion and mistake which has caused disproportionate adverse impact. Counsel states:

a. The applicant is requesting, through counsel, to appeal his characterization of service upgrade request following the ADRB's failure to consider its mandate to correct a manifest injustice and failed to follow its own procedures in evaluating the applicant's request.

b. Counsel states the applicant enlisted on 6 October 2005 for a period of eight years in the United States Army Reserve (USAR). He completed basic training and advanced individual training (AIT) with no disciplinary issues/positive marks, serving a total of six months and fifteen days. He was charged with being absent without authority (AWOL) on 17 April 2006 for approximately thirty-five days. While the applicant did leave his unit, he did not intend to abandon service in the Army. The applicant testified that he spent \$350 in new uniforms during his absence in anticipation of reassignment to a different unit. He mistakenly thought he could get a release from his reserve contract to join Special Operations on the active duty. Other than this isolated one-time mistake, the applicant's service record is spotless and lacks any indication of frequent incidents of misconduct or an established pattern of shirking his responsibilities. He was discharged from the Army Reserves under other than honorable conditions in lieu of trial by court-martial on 17 May 2006.

c. The applicant petitioned the ADRB on 13 December 2020. His request for an upgrade to an honorable discharge was denied on 18 January 2022. The ADRB acknowledged the applicant's contention and testimony that his motive was to be released from his reserve contract to join Special Operation in the active component. However, the ADRB claimed "there was no evidence in the applicant's Army Military Human Resource Record to indicate an offer to attend Special Forces Assessment and Selection, or any other training. The ADRB acknowledged it looked at factors from the 2017 memo signed by ██████████ concerning potential mitigating factors from medical records but found none. However, an updated Memorandum on Guidance to Military Discharge Review Boards and Boards for Correction was sent out in July 2018. The

ADRB did not acknowledge this Memorandum in its decision letter. This Memorandum instructed review boards that they shall consider a variety of factors in determining whether relief should be granted "on the basis of equity, injustice, or clemency."

d. Counsel quotes several different paragraphs within the memos stated above.

- paragraph 6(a), states it is appropriate to grant relief and "to favor second chances in situations in which individuals have paid for their misdeeds."
- paragraph 6(c), states that individuals do not have to have a "flawless military service" record to obtain an honorable discharge characterization
- paragraph 6(e), states that a veteran's "sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief."
- paragraph 6(j) acknowledges that "similarly situated Service members sometimes receive disparate punishments" and review boards should "consider uniformity and unfair disparities in punishments as a basis for relief."
- Furthermore, there are eighteen factors review boards should consider when deciding to grant relief on equity or injustice grounds

e. Counsel argues applicable law, policy, and addresses and argues similar cases. (The entire argument is available for the Board's review in documents).

f. Furthermore, this Board ought to evaluate some of the eighteen additional factors when considering whether to grant the applicant's request for an upgraded discharged characterization. The 2018 Memorandum makes it clear that review boards should consider factors listed in counsel's argument such as 7(b), 7(c), 7(d), 7(f), 7(g), 7(m), 7(n), and 7(o) (The entire argument is available for the Board's review in documents).

g. In closing counsel argues the applicant was denied an upgrade from an Under Other Than Honorable Conditions discharge for a brief AWOL period of 35 days made under a mistaken belief that he could transfer to active duty. The actions of the ADRB were arbitrary, capricious, and did not evaluate the factors they were instructed to look at in the 2018 Memorandum. It would be unjust and unfair to allow the disparity between the applicant's discharge to stand in light of evidence of other service members with far more significant and/or recurrent AWOL periods to be awarded an upgrade in characterization. Please act to correct this injustice on the grounds of equity and fairness.

3. The applicant enlisted in the USAR on 6 October 2005; he subsequently enlisted in the Regular Army on 3 November 2005.

4. A DD Form 616 (Report of Return of Absentee) shows the applicant was apprehended by civil authorities on 11 April 2006 from an AWOL that began on 7 March

2006. A telephone/verbal conversation record shows in the remarks section "may require escorts, has stated intent not to return."

5. DD Form 458 (Charge Sheet) shows court martial charges were preferred on 17 April 2006, for the charge of AWOL and the specification of on or about 7 March 2006, without authority, absent himself from his organization, and did remain so absent until on or about 11 April 2006.

6. On 17 April 2006, the applicant voluntarily requested discharge in lieu of trial by court-martial under AR 635-200, chapter 10. He understood that he may request discharge in lieu of trial by courts-martial because of the charge of AWOL from 7 March – 11 April 2006 which had been preferred against him under the Uniform Code of Military Justice (UCMJ), authorized the imposition of a bad conduct or dishonorable discharge. He had the opportunity to consult with counsel who has fully advised him of the nature of his rights under the UCMJ, the elements of the offense with which he was charged, any relevant lesser included offense(s) thereto, and the facts that must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if he was found guilty.

a. He understood that, if his request for discharge is accepted, he may be discharged under conditions which are other than honorable and furnished an Under Other than Honorable Discharge Certificate.

b. He had been advised and understood the possible effects of an other than honorable discharge and that as a result of the issuance of such discharge, he will be deprived of many or all Army benefits, that he may be ineligible for many or all benefits administered by the Veteran's Administration, and that he may be deprived of his rights and benefits as a veteran under both Federal and State law.

c. He also understood that he may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Discharge.

7. On 26 April 2006, his chain of command recommended an under other than honorable conditions discharge.

8. On 5 May 2006, the discharge authority approved his request and directed an under other than honorable conditions discharge. He also directed the applicant be reduced to pay grade private E-1.

9. Accordingly, he was discharged on 17 May 2006, under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 10.

His DD Form 214 shows he completed 6 months and 15 days net active service this period. His DD Form 214 also shows:

- Item 26 (Separation Code): KFS
- Item 27 (Reentry Code): 4
- Item 28 (Narrative Reason for Separation): In Lieu of Trial by Court-Martial
- Item 29 (Dates of Time Lost During this Period): None

10. The applicant applied to the Army Discharge Review Board (ADRB) (AR20070013570) for an upgrade of his character of service. On 31 July 2008, the ADRB, after careful consideration of his military records and all other available evidence, determined that he was properly and equitably discharged. Accordingly, his request for a change in the type and nature of his discharge was denied.

11. The applicant applied to the ADRB (AR20210007889) again for an upgrade of his character of service. On 18 January 2022, the ADRB, after careful consideration of his military records and all other available evidence, determined that he was properly and equitably discharged. Accordingly, his request for a change in the type and nature of his discharge was denied.

12. The applicant provides:

- a. ADRB letter to senator, 10 January 2023, notifying the congressman of the denial.
- b. ADRB letter to applicant, 18 January 2022, notifying the applicant of the denial.
- c. Separation order showing he was to be discharged on 17 May 2006.
- d. Privacy act request the applicant submitted.
- e. Incident Report related to his AWOL.
- f. U.S. Army Criminal Investigation Command letter related to the applicant's AWOL status.
- g. Commander's Report of Disciplinary or Administrative Action related to the applicant's AWOL status.
- h. Military Police Reports related to the applicant's AWOL status.
- i. Counsel Supplemental Statement dated 12 December 2020, related to a DD Form 293 on behalf of the applicant previously submitted.

MEDICAL REVIEW:

The Army Review Board Medical Advisor reviewed the application, all supporting documents, and the evidence found within the military record and the arguments and statements provided by the applicant and their counsel. This review also extended to documentation in the Joint Longitudinal Viewer. The medical provider did not find any medical or behavioral health issues.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant’s contentions, the military record, and regulatory guidance were carefully considered. Based upon the short term of honorable service completed prior to the AWOL offense leading to the applicant’s separation, as well as the finding of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant’s characterization of service, separation code, reentry code and/or narrative reason for separation.

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.

5/14/2024

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. 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. However, 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 635-200 provides the basic authority for the separation of enlisted personnel. Chapter 3, Section II provides the authorized types of characterization of service or description of separation.
  - a. Paragraph 3-7a states an honorable discharge is a separation with honor and 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 states a general discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c states under other-than-honorable-conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

d. Chapter 10 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 a 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. Army policy states that although an honorable or general, under honorable conditions discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

e. Paragraph 5-3 states, in pertinent part, that the separation of enlisted personnel is the prerogative of the Secretary of the Army and will be affected only by his authority. Except as delegated by these regulations or by special Department of the Army directives, the discharge or release of any enlisted member of the Army for the convenience of the Government will be at the Secretary's discretion and with the type of discharge as determined by him. Such authority may be given either in an individual case or by an order applicable to all cases specified in such order.

4. AR 601-210 (Regular Army and Reserve Components Enlistment Program), governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DODI 1304.26. It also prescribes the appointment, reassignment, management, and mobilization of Reserve Officers' Training Corps cadets under the Simultaneous Membership Program. Chapter 4 provides the criteria and procedures for waiverable and non-waiverable separations. Table 3-1, defines reentry eligibility (RE) codes:

a. RE-1 Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army. Eligibility: Qualified for enlistment if all other criteria are met.



b. RE-3 Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waivable. Eligibility: Ineligible unless a waiver is granted.

c. RE-4 Applies to: Person separated from last period of service with a non-waivable disqualification. This includes anyone with a DA imposed bar to reenlistment in effect at time of separation or separated for any reason (except length of service retirement) with 18 or more years of active Federal service. Eligibility: Ineligible for enlistment.

5. AR 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "KFS" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 10, In Lieu of Trial by Court-Martial. Also "KFF" as the appropriate code to assign for Secretarial authority. The SPD Code/RE Code Cross Reference Table shows that a Soldier assigned an SPD Code of "KFS" will be assigned an RE Code of "4." The Secretary of the Army will determine RE Code for separations under Secretarial Authority. SPD code may be used when HQDA message or other directive authorizes voluntary separation in an individual case or category of cases.

6. The Acting Principal Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

7. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (TBI), 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. 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.

a. Guidance documents are not limited to under other than honorable conditions discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

8. 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.

c. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs should also consider the following, as applicable:

- An applicant's candor
- Whether the punishment, including any collateral consequences, was too harsh
- The aggravating and mitigating facts related to the record or punishment from which the veteran or Service member wants relief
- Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue
- Severity of misconduct
- Length of time since misconduct
- Acceptance of responsibility, remorse, or atonement for misconduct
- The degree to which the requested relief is necessary for the applicant
- Character and reputation of applicant
- Critical illness or old age
- Meritorious service in government or other endeavors
- Evidence of rehabilitation
- Availability of other remedies
- Job history
- Whether misconduct may have been youthful indiscretion
- Character references
- Letters of recommendation
- Victim support for, or opposition to relief, and any reasons provided

//NOTHING FOLLOWS//