

IN THE CASE OF: ██████████

BOARD DATE: 1 February 2024

DOCKET NUMBER: AR20230007169

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a telephonic/personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Three Character Letters
- Four Certificates of Completion

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190014301 on 2 March 2020.

2. The applicant states the kid that he was then is not the man he is now. He entered the military at the age of 18 and 2 years after the passing of his mom. He thought he had properly grieved, but he did not. He tried dealing with his emotions/feelings the best way he could, but it became too much for him, so he resorted to drugs. Prior to his arrest, he had not been in any trouble and was an outstanding Soldier. Additionally, the applicant checked the "other mental health" box associated with his application.

3. The applicant provided:

a. Three letters, from his veteran's service officer, his co-worker, and his child's teacher, that speak to his moral character being impressive as well as his strong dedication to his family and friends.

b. Four completion certificates relating to his civilian employment in automobile services.

4. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 3 August 1995. He held military occupational specialty 11C (Indirect Fire Infantryman).

b. On 7 October 1996, the applicant's duty status changed from present for duty to absent without leave (AWOL).

c. On 6 November 1996, the applicant's duty status changed from AWOL to dropped from rolls.

d. On 10 April 1997, the applicant was apprehended and returned to military control.

e. On 12 May 1997, the applicant's commander, by memorandum, confirmed with civilian authorities that the applicant was confined in county jail and pending trial.

f. On 2 June 1998, the applicant was plead guilty to distributing cocaine in the State of Louisiana. He was sentenced to 5 years at hard labor under the supervision of the Department of Corrections with time served since his arrest.

g. On 26 August 1998, the applicant's immediate commander initiated action to separate the applicant for misconduct, civil conviction, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-5.

(1) The commander's reason for the proposed action was the applicant was convicted by a civilian court on or about 2 June 1998 for distribution of cocaine, a controlled substance, and sentenced to serve 5 years at hard labor under the supervision of the Department of Corrections with credit for time served.

(2) The commander recommended the applicant be separated with issuance of an under other than honorable conditions discharge.

h. On 14 September 1998, after consulting with counsel of the basis for the contemplated action to separate him for misconduct, civil conviction, under AR 635-200, Chapter 14, and its effects, of the rights available to him, and the effect of any action taken by him in waiving his rights. He understood that because an under other than honorable conditions discharge was recommended, he is entitled to have his case heard by an administrative separation board.

- statements were not submitted for consideration by the applicant
- he waived counsel
- he understood that he may expect to encounter substantial prejudice in civilian life if a general discharge was issued to him

- he understood if he was discharged with an under other than honorable conditions discharge, he may be ineligible for many or all benefits which veterans are entitled to under Federal and State law
- he waived consideration of his case by an administrative separation board
- he waived personal appearance before an administrative separation board
- he did not intent to appeal his civilian conviction

i. On 21 October 1996, consistent with the chain of command recommendations, the separation authority approved the applicant's separation. An Other Than Honorable Conditions Discharge Certificate and a letter barring the applicant from the installation will be furnished.

j. On 13 November 1998, the applicant was discharged accordingly. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 9 months, and 5 days of active duty service with lost time from 7 October 1996 to 10 April 1997. His DD Form 214 also shows in:

- item 24 (Character of Service): Under Other Than Honorable Conditions
- item 25 (Separation Authority): AR 635-200, Chapter 14, Section II
- item 28 (Narrative Reason for Separation): Misconduct

k. The applicant previously applied to the ABCMR for a review of his discharge. On 2 March 2020, his application was denied. The Board determined the evidence presented did not demonstrate the existence of probable error or injustice and the overall merits of the case were insufficient as a basis for correction of the records of the applicant.

5. By regulation, a Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty. A punitive discharge would be authorized for the same or a closely related offense.

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

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he had mental health conditions that mitigated his misconduct.

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 was enlisted in the Regular Army on 3 August 1995; 2) The applicant was found AWOL from 7 October 1996-10 April 1997; 3) On 2 June 1998, the applicant was plead guilty to distributing cocaine in the State of Louisiana. He was sentenced to 5 years at hard labor under the supervision of the Department of Corrections with time served since his arrest; 4) The applicant was discharged on 13 November 1998, Chapter 14-Misconduct. His service was characterized as UOTHC; 5) The ABCMR reviewed and denied his request for an upgrade of his discharge on 2 March 2020.

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

d. The applicant noted mental health conditions as contributing and mitigating factors in the circumstances that resulted in his separation. There was insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV provided evidence the applicant has been treated for anxiety and depression in recent years, but these conditions were related to events that occurred after his discharge. The applicant has not been diagnosed with a service-connected mental health condition and receives no service-connected disability.

e. Based on the available information, it is the opinion of the ARBA BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing mental health conditions that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing mental health conditions while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions, but this is not sufficient to establish a history of a condition during active service. Also, there is no nexus between the applicant's reported mental health conditions and the distribution of cocaine: 1) this type of misconduct is not part of the natural history or sequelae of the applicant's reported mental health conditions; 2) his reported mental health conditions do not affect one's

ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health conditions or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA BH Advisor. The Board found the evidence of post-service achievements and letters of reference provided by the applicant insufficient in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. 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.

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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20190014301 on 2 March 2020.

5/6/2024

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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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), sets forth the basic authority for the separation of enlisted Soldiers.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization of service 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 of service 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 14, Section II (Conviction by Civil Court) states a Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty. A punitive discharge would be authorized for the same or a closely related offense.

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. 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. 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.

//NOTHING FOLLOWS//