

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230007218

APPLICANT REQUESTS:

- upgrade of his under than honorable conditions discharge to honorable
- change the narrative reason for separation, the authority, the separation code and the reentry eligibility code to more favorable designations.

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

- DD Form 293 in lieu of DD form 149 (Application for Correction of Military Record), 24 April 2023
- DD Form 214, (Certificate of Release or Discharge from Active Duty), 4 February 2002
- (Treatment Center) Treatment Program Certification Letter, 25 January 2023
- letter of reference, undated
- letter, Youth Academy, 4 May 2000
- General Education Diploma, 3 May 2000
- Department of Veterans Affairs (VA) Statement, undated

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 marked on his application that post-traumatic stress disorder and other mental health conditions were related to his request. He states, in effect:

a. He enlisted at 17 years of age. He was young and immature and had a substance abuse problem leading to his discharge. He wished the Army had made him take counseling because he believed his life would have been better in the Army.

b. Since being discharged he has had multiple convictions and incarcerations. In the last 5 years he has gotten his life back together, gotten his children back, and has

become an upstanding member of society. He has started his own business. He would like his discharge upgraded to give he and his family a chance of a normal life.

3. The applicant provided copies of:

a. A youth academy letter and GED Certificate from the year 2000.

b. A human skills treatment program letter of reference documenting his completion a court ordered recovery and relapse prevention program in 2021, during which he completed 63 group sessions of 1.5 hours each. He also attended 25 individual sessions comprised of both individual psychotherapy and peer recovery support specialist sessions. This letter also provided the applicant instructions on how to gain access to records involved with his treatment.

c. His church pastor letter of reference showing he was a committed member of his church displaying loyalty and integrity in his dealings.

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

a. On 11 May 2000, he enlisted in the U.S. Army Reserve (USAR) Delayed Entry Program (DEP) at age 17. On 21 July 2000, he was discharged from the USAR DEP in order to enlist in the Regular Army at age 18.

b. A DD Form 513 (Deserter/Absentee Wanted by the Armed Forces) shows he was absent from this place of unit, B Battery, 2d Battalion, 4th Field Artillery, Fort Sill, on 4 January 2001, and subsequently reported as a deserter on 5 February 2001.

c. A DD Form 616 (Report of Return of Absentee) shows he was apprehended by civil authorities on 3 April 2001 and returned to military control at Personnel Control Facility, Fort Sill, on 3 April 2001.

d. On 10 April 2001, a court-martial charge was preferred against him. A DD Form 458 (Charge Sheet) dated 6 April 2001 shows he was charged with one specification of AWOL from his unit, Bravo Battery, 2d Battalion, 4th Field Artillery, Fort Sill, from on or about 4 January 2001 to 6 April 2001. Note: an erroneous entry on this form showing an AWOL end date of 4 April 2001 was marked out and pen changed to 6 April 2001.

e. After consulting with legal counsel on 13 April 2001, he voluntarily requested discharge in lieu of trial by court-martial, under the provisions of Army Regulation (AR) 635-200, chapter 10, in lieu of trial by court-martial. In doing so, he acknowledged that the charges preferred against him under the UCMJ, authorized the imposition of a bad conduct discharge or dishonorable discharge. He further acknowledged:

- he had not been subjected to coercion with respect to his request for discharge
- he had been advised of the implications that were attached to it
- by submitting the request, he was acknowledging he was guilty of the charges against him or of (a) lesser included offenses therein contained which also authorized imposition of a bad conduct or dishonorable discharge
- he could be discharged under other than honorable conditions and he could be ineligible for many or all benefits administered by the Department of Veterans Affairs (VA)
- he could be deprived of many or all Army benefits and he could be ineligible for many or all benefits as a veteran under both Federal and State laws
- he could expect to encounter substantial prejudice in civilian life by reason of an under other than honorable conditions discharge
- there was no automatic upgrading of or automatic review of a less than honorable discharge by any Government agency or the Army Board for the Correction of Military Records and that he must apply to either the Army Discharge Review Board or the Army Board for Correction of Military Records
- an act of consideration by either Board does not imply that his discharge would be upgraded
- he was advised he could submit any statements he desired in his own behalf, and elected not to do so
- he was advised he could request a physical evaluation prior to separation and he elected not to do so

f. On 11 December 2001, Commanding Officer, A Battery, Personnel and Support Battalion, U.S. Army Field Artillery Center and Fort Sill, recommended approval of his Chapter 10 request, with an under other than honorable conditions discharge, and forwarded his request to the approval authority.

g. On 4 January 2002, the separation authority approved his request for discharge, under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial. He directed the applicant's discharge with an under other than honorable conditions character of service and his reduction to private/E-1.

h. On 4 February 2002, he was discharged. His DD Form 214 shows he was discharged under the provisions of AR 635-200, chapter 10, in lieu of trial by court-martial, with a characterization of service of under other than honorable conditions. He was credited with completing 1 year, 2 months, and 4 days of net active service. His DD Form 214 does not show he had any lost time during this period, however, block 29 (Dates of Time Lost During this Period) should show 91 days of time lost between 4 January 2001 to 6 April 2001. He had 298 days of excess leave between 13 April 2001 and 4 February 2002. He was assigned separation code KFS and the narrative separation listed as "In Lieu of Trial by Court-Martial," with Reentry Code 4.

5. There is no evidence the applicant applied to the Army Discharge Review Board for upgrade of his discharge within its 15-year statute of limitations.

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 an upgrade of his under other than honorable conditions discharge. He contends he had mental health conditions including PTSD 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 21 July 2000; 2) On 10 April 2001, a court-martial charge was preferred against him for being AWOL from 4 January-6 April 2001; 3) On 4 February 2002, the applicant was discharged, chapter 10, in lieu of trial by court-martial, with a characterization of service of under other than honorable conditions.

c. The Army Review Board Agency (ARBA) Medical 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 including PTSD as contributing and mitigating factors in the circumstances that resulted in his separation. There was no indication 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.

e. Based on the available information, it is the opinion of the Agency 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 including PTSD that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing mental health conditions including PTSD 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 including PTSD while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions including PTSD, but this is not sufficient to establish a history of a condition during active service. However, the applicant contends he was experiencing a mental health condition including PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### 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 considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. 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 found no error or injustice in his separation processing. 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. 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.

b. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that after he went AWOL and had court-martial charges preferred against him, he chose to be discharged under chapter 10 in lieu of trial by a court-martial. Absent his AWOL, there was no reason to prefer court-martial charges against him. The underlying reason for his discharge was his AWOL and subsequent voluntary request for discharge in lieu of the court-martial. The only valid narrative reason for separation permitted under chapter 10 is "In Lieu of trial by a court-martial" and the appropriate separation code associated with this discharge is KFS which at the time had a corresponding RE Code of 4.

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.



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 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3-7 provides:

(1) 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. Only the honorable characterization may be awarded a Soldier upon completion of his/her period of enlistment or period for which called or ordered to active duty or active duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

b. Chapter 10 provided, that a member who has committed an offense or offenses for which the authorized punishment included a punitive discharge may submit a request for discharge 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.

3. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Chapter 3 prescribes basic eligibility for prior-service applicants for enlistment and includes a list of Armed Forces reentry eligibility (RE) codes.

- RE-1 applies to persons completing an initial term of active service who are considered qualified to reenter the U.S. Army if all other criteria are met
- RE-3 applies persons who are not considered fully qualified for reentry or continuous service at the time of separation, but disqualification is waivable
- RE-4 applies to persons separated from their last period of service with a nonwaivable disqualification
- RE-4R applies to persons who retired for length of service with 15 or more years of active Federal service
- RE-1A, 1B, 1C, 2, 2B, 2C, and 4A apply to persons who separated prior to the effective date of this regulation – qualified for enlistment provided the reason and authority do not preclude enlistment or require a waiver – applicants may not enlist until 93 days after separation if otherwise qualified

- RE-2A, 3A, 3B, 3C, 3D, 3E, 3S, and 3V apply to persons separated prior to the effective date of this regulation but did not meet reentry criteria at the time of separation

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "KFS" corresponded to "In Lieu of Trial by Court-Martial," and the authority, Army Regulation 635-200, chapter 10.

5. 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 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.

6. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

8. 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//