

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230007261

APPLICANT REQUESTS: His under honorable conditions (general) discharge be upgraded to an honorable discharge.

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

- DD Form 293 (Application for the Review of Discharge) in lieu of the DD Form 149
- Copy of Army Discharge Review Board denial (AR20000005056)
- Department of Veterans Affairs (VA) disability rating

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, in effect that he has a service connected Major Depressive Disorder, which should be seen as a mitigating factor of his behavior while on active duty. On his application, he indicates a mental health condition as contributing and mitigating factors in the circumstances that resulted in his separation.
3. A review of the applicant's service records shows he enlisted in the Regular Army on 30 December 2014 for 4 years. He completed training and was awarded the military occupational specialty 88N (Transportation Management Coordinator). The highest rank he attained was E-4.
4. On 19 April 2017, the applicant was involved in an incident at his residence that resulted in his arrest by civilian authorities for brandishing a firearm. The available record contains a complete copy of the documentation and actions related to this incident.
5. On 5 December 2017, the applicant was disapproved for award of the Army Good Conduct Medal, due to the firearm incident.

6. A DA Form 3822-R (Report of Mental Status Evaluation), dated 14 February 2018 found the applicant had a condition that is likely to impair his judgment or reliability to protect classified information.

a. The attending physician wrote that the applicant had been referred for a command directed mental health evaluation, after he was placed on probation for brandishing a weapon/misdemeanor assault and also reported a history of unresolved grief. The applicant requested therapy for his unresolved grief about his mother's death 11 years prior, after he was arrested suggesting that he requested behavioral health care in hopes for a more lenient legal/administrative outcome. Additionally, he has never previously requested or received any behavioral health treatment, supporting the present clinician's hypothesis that he has emotionally resolved his mother's death 11 years prior.

b. The physician opined that his misconduct was due to underlying anti-social personality traits rather than a treatable psychiatric disorder. The applicant's mother's death did not cause, contribute, or mitigate his current legal problems and the present clinician recommends that his misconduct is addressed via the appropriate administrative chapter.

c. The report also reflects that although the applicant was diagnosed with legal problems and anti-social personality traits he was cleared for any administrative actions deemed appropriate by the command. The applicant could understand the difference between right and wrong and could participate in the proceedings.

7. The applicant was afforded a medical examination on 5 March 2018, which found no medical conditions warranting further medical treatment.

8. On 6 April 2018, as a result of the firearm incident, the applicant received a general counseling notifying him of a recommendation to discharge him.

9. A packet of submissions was provided that included a personal statement of the incident, seven third party letters of support, the police documentation of the incident and a copy of a Certificate of Completion for the Anger Management Course on 24 April 2018.

10. The applicant's immediate commander notified the applicant on 14 May 2018 of his intent to initiate actions to separate him under Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14- 12c for misconduct – commission of a serious offence. His commander noted the specific reasons as the firearm incident.

11. The applicant consulted with legal counsel on 18 May 2018. He was advised of the basis for the contemplated discharge, the possible effects of an under honorable conditions discharge, and the procedures and rights that were available to him. He submitted a packet of submissions that included a personal statement of the incident, seven letters of support, and the police documentation of the incident and a copy of a Certificate of Completion for the Anger Management course.
12. The applicant's immediate commander formally recommended his separation from service under the provisions of AR 635-200, paragraph 14-12c on 29 May 2018.
13. The appropriate authority approved the discharge recommendation on 1 June 2018 and directed the applicant be issued a General Discharge Certificate.
14. The applicant was discharged on 25 June 2018 in the pay grade of E-4. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c for misconduct (Serious Offense) with an under honorable conditions (general) character of service, a Separation Code JKQ, and a Reentry Code of 3. He was credited with 3 years, 5 months, and 26 days of net active service with no lost time. His awards are shown as the National Defense Service Medal, Global War on Terrorism Service Medal, and the Army Service Ribbon.
15. The Army Discharge Review Board denied that applicant's request for an upgrade on 3 April 2023.
16. The applicant provided a copy of a VA disability rating decision, dated 1 July 2022, that afforded him a 40 percent evaluation for lumbosacral strain, a 50 percent evaluation for major depressive disorder with anxious distress and alcohol use disorder and entitlement to individual unemployability.
17. In determining whether to grant relief, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.
18. MEDICAL REVIEW:
 - a. Background: The applicant is requesting a reconsideration of his previous request to upgrade his under honorable conditions (general) discharge to honorable. He contends other mental health condition mitigates his discharge. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:
 - Applicant enlisted in the RA on 30 December 2014.
 - On 19 April 2017, the applicant was involved in an incident at his residence that resulted in his arrest by civilian authorities for committing an aggravated assault

by unlawfully brandishing a firearm in a manner so as to reasonably induce fear in the mind of another of being shot or injured.

- Applicant's immediate commander notified the applicant on 14 May 2018 of his intent to initiate actions to separate him under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c for misconduct – commission of a serious offence. His commander noted the specific reasons as the firearm incident.
- Applicant was discharged on 25 June 2018. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c for misconduct (Serious Offense) with an under honorable conditions (general) character of service, a Separation Code JKQ, and a Reentry Code of 3.

b. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, his ABCMR Record of Proceedings (ROP), DD Form 214, Army Discharge Review Board denial (AR20200005056), VA disability rating, and documents from his service record and separation packet. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. The applicant states, he has a service-connected diagnosis of Major Depressive Disorder, which should be seen as a mitigating factor of his behavior while on active duty.

d. A police report dated 19 April 2017, indicates the applicant had an on/off again relationship with a woman who had been living in his residence since January 2017. The applicant pointed a gun at the woman and yelled at her to get out of the apartment. The woman was afraid she would be shot and left the residence without her cell phone or shoes and flagged down a passer-by to call the police. She reported that they had argued because the applicant thought she was flirting with his roommate and became jealous. There were six people in the residence, at the time of this incident, and they felt threatened by the applicant waving his gun at them. The applicant had purchased the gun the day prior.

e. Active-duty electronic medical records available for review indicate the applicant was seen for a command referred Mental Status Evaluation, on 14 February 2018, after he was sentenced to two years of probation for misdemeanor assault/brandishing a firearm. The applicant seemed to minimize his culpability by claiming that he simply "made a mistake" and had "never previously been arrested in his life" and, therefore, should be given a second chance and retained on active duty. The clinician notes the applicant requested therapy for his unresolved grief about his mother's death (11 years prior), after he was arrested and dropped out of treatment after only one session

because he did not agree with his clinician's treatment approach. The clinician opined the applicant appeared to request behavioral health services in hopes of a more lenient legal/administrative outcome. The clinician further opined that the applicant's misconduct was due to underlying anti-social personality traits rather than a treatable psychiatric disorder and his mother's death did not cause, contribute, or mitigate his legal issues. It was recommended his misconduct be addressed via the appropriate administrative chapter. In addition, the applicant could understand the difference between right and wrong and could participate in the proceedings. He was cleared for any administrative actions deemed appropriate by the command.

f. The VA electronic medical records available for review indicate the applicant is 90% service-connected including 50% for Major Depressive Disorder. The applicant has participated intermittently in behavioral health treatment via the VA, with a focus on his alcohol use and issues of depressed mood. His most recent behavioral health encounter on 30 November 2023 has him diagnosed with Uncomplicated Bereavement and Alcohol Use Disorder.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is evidence the applicant had a behavioral health condition during military service. However, his BH condition would not mitigate his discharge.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is 50% service connected for Major Depressive Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant's diagnosis of Major Depressive Disorder does not mitigate his aggravated assault by unlawfully brandishing a firearm in a manner so as to reasonably induce fear in the mind of another of being shot or injured, since this is not a progression or sequela of depression. In addition, Major Depressive Disorder does not impact the ability to distinguish right from wrong and act in accordance with the right.

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. Title 10, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
 - a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member'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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.
 - d. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was, or could be authorized for that same or relatively similar offense under the UCMJ.
4. 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. BCM/NRs 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.

//NOTHING FOLLOWS//