

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230007489

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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

DD Form 149 (Application for Correction of Military Record)

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 his health was failing at the time of his court-martial. The senior noncommissioned officers didn't want to take it to trial so they offered this over an honorable so that he could do an upgrade request later. He still has all his benefits from his previous enlistment. He was charged with something he didn't do, and they knew it. He filed 15 years ago; he never heard back. This is very important to him then and now.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD), and other mental health issues are related to his request.
4. The applicant enlisted in the Regular Army on 16 October 1991. He extended his enlistment on 12 April 1996, and reenlisted on 5 September 1996. The highest grade he attained was E-5.
5. Court-martial charges were preferred against the applicant on 28 May 1997, for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with two specifications of with the intent to deceive, making false statements to two superior noncommissioned officers, and one specification of stealing U.S. currency, military property of a value of \$4,547.10.

6. On 31 July 1997, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. His legal counsel submitted a statement on his behalf requesting an under honorable conditions (general) discharge. His counsel cited his six years of honorable service to the country, his military awards, and his repayment of half of his debt back to the government.

7. On 19 August 1997, the applicant's commander formally recommended approval of the applicant's request for discharge.

8. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 21 August 1997, and directed his reduction to the lowest enlisted grade with the issuance of a UOTHC discharge.

9. The applicant was discharged on 15 September 1997. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Code 3. He completed 5 years and 11 months of net active service this period.

10. Additionally, his DD Form 214 shows he was awarded or authorized the:

- Army Achievement Medal
- Army Good Conduct Medal
- National Defense Service Medal
- Noncommissioned Officer's Professional Development Ribbon with Numeral
- Army Service Ribbon

- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge with Pistol Bar
- Expert Marksmanship Qualification Badge with Automatic Rifle Bar
- Driver/Mechanic Badge with Driver-W Bar

11. On 24 August 2023, the ABCMR staff requested that the applicant provide medical documents to support his claim of PTSD as a contributing factor in the circumstances that resulted in his discharge. He did not respond.

12. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

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

14. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

b. 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 16 October 1991. He extended his enlistment on 12 April 1996, and reenlisted on 5 September 1996.
- Court-martial charges were preferred against the applicant on 28 May 1997, for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with two specifications of with the intent to deceive, making false statements to two superior noncommissioned officers, and one specification of stealing U.S. currency, military property of a value of \$4,547.10.
- Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him.
- His legal counsel submitted a statement on his behalf requesting an under honorable conditions (general) discharge. His counsel cited his six years of

honorable service to the country, his military awards, and his repayment of half of his debt back to the government.

- Applicant was discharged on 15 September 1997. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Code 3.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. 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.

d. The applicant states his health was failing at the time of his court-martial. The senior noncommissioned officers didn't want to take it to trial so they offered this over an honorable so that he could do an upgrade request later. He still has all his benefits from his previous enlistment. He was charged with something he didn't do, and they knew it. He filed 15 years ago; he never heard back. This is very important to him then and now. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) and other mental health issues are related to his request.

e. Due to the period of service, no active-duty electronic medical records were available for review and no hard copy medical documentation from the time of service were submitted for review. The applicant is 80% service connected for various medical conditions but there is no service connection for any BH condition. On 24 August 2023, the ABCMR staff requested the applicant provide medical documents to support his claim of PTSD as a contributing factor in the circumstances that resulted in his discharge. He did not respond. The VA electronic medical record available for review indicates the applicant initially sought treatment with the VA in 2019. A medical encounter dated 20 August 2019, notes the applicant reported chronic pain issues and methadone for pain control at a methadone clinic (via a non-VA provider). He was referred for a mental health diagnostic and then had minimal engagement. Mental Health notes dated 18 May 2021, 25 May 2021 and 30 June 2021 indicate the applicant reported he broke his back 3 years prior and his physical health rapidly declined. He stated he had met with many doctors and did not feel he was receiving the appropriate care, "I am not drug seeking, I am medical seeking". He was diagnosed with Adjustment Disorder. A mental health multidisciplinary note, dated 27 May 2022, indicates the applicant was recommended for an evidenced based pain related mental health

treatment since his issues were due to chronic pain and psychosocial issues related to his history of Opioid Use Disorder. The applicant did not engage with this recommendation. He sought mental health services once again via the VA in 2023, and a social work assessment indicates he reconnected since he wanted mental health services and to get his discharge status upgraded. The applicant was seen for an initial psychiatry assessment on 30 January 2024 and diagnosed with Adjustment Disorder.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a BH condition during his time in service.

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 contends mitigating conditions.

(2) Did the condition exist or experience occur during military service? Yes. The applicant notes post-traumatic stress disorder (PTSD) and other mental health condition on his application as related to his request. He further indicates his health was failing at the time of his court-martial.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is no medical documentation of an in-service BH diagnoses and the VA has not service connected the applicant for any BH condition. The applicant's VA record indicates he has been diagnosed with Opioid Dependency and Adjustment Disorder due to his reported chronic pain issues, due to an injury post-military service, and psychosocial issues related to his history of Opioid Use Disorder. The applicant was discharge from military service since on two separate occasions, with intent to deceive, he made false official statements, that he was waiting for his divorce to be finalized when he had already divorced his wife. In addition, he stole U.S. currency, military property of a value of \$4,547.10. And while the applicant selected PTSD and other mental health as related to his upgrade request, none of these conditions would mitigate his discharge. There is no nexus or natural sequela between any of his self-asserted BH conditions and his charges of theft and making false official statements, since none of the conditions would interfere with the capacity to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

1. The Board reviewed the applicant's request, supporting documents, his statement, the evidence in the records, the medical review, and published Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests.

2. The Board carefully considered the applicant's request to upgrade his characterization of service to honorable and determined relief was not warranted, based upon the Medical Advisor's opinion that the applicant's claimed behavioral health condition or experience did not actually excuse or mitigate the discharge. The Board focused on two portions of the advisory opinion:

a. First, the medical advisor specifically notes: "There is no medical documentation of an in-service BH diagnoses and the VA has not service connected the applicant for any BH condition... "

b. Second, and most importantly, the medical advisor's statement that, "And while the applicant selected PTSD and other mental health as related to his upgrade request, none of these conditions would mitigate his discharge. There is no nexus or natural sequela between any of his self-asserted BH conditions and his charges of theft and making false official statements since none of the conditions would interfere with the capacity to distinguish right from wrong and act in accordance with the right."

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. 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, 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 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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 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//