

IN THE CASE OF: ██████████

BOARD DATE: 28 February 2024

DOCKET NUMBER: AR20230007966

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions (UOTHC) characterization of service
- personal appearance hearing before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 29 May 2002
- health summary, 22 May 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 was suffering from undiagnosed anxiety, depression, and attention deficit hyperactivity disorder at the time of his enlistment. Before starting basic training, a Drill Sergeant told him to leave.
3. The applicant enlisted in the Regular Army on 7 August 2001, for 3 years.
4. Two DA Forms 4187 (Personnel Action) show, effective 15 August 2001, the applicant's unit reported him absent without leave, and on 14 September 2001 he was dropped from the rolls. His duty status changed to return to military control when he surrendered to military authorities on 31 March 2002.
5. On 3 April 2002, court-martial charges were preferred against the applicant. The DD Form 458 (Charge Sheet) shows he was charged with absenting himself from his

organization from on or about 15 August 2001 and did remain so absent until on or about 31 March 2002.

6. The applicant consulted with legal counsel on 3 April 2002 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the Uniform Code of Military Justice (UCMJ); the possible effects of a UOTHC discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, discharge 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. He elected not to submit a statement in his own behalf.

7. The applicant's chain of command recommended approval of the applicant's request for discharge and the issuance of a discharge UOTHC.

8. On 29 April 2002, the separation authority approved the applicant's request for discharge under the provisions of AR 635-200, Chapter 10, and ordered the issuance of an UOTHC discharge and the applicant's reduction to private/E-1.

9. The applicant was discharged accordingly on 29 May 2002, under the provisions of AR 635-200, Chapter 10, by reason of in lieu of trial by court-martial, with an UOTHC characterization of service in the grade of E-1. He received a separation code of "KFS" and a reentry of "4." His DD Form 214 contains the following entries:

a. He completed 2 months and 5 days of net active service during the period covered.

b. Block 29 (Dates of Time Lost During this Period) the entry "20010815 – 20020330"

10. The applicant provides a copy of his health summary that list the following health issues:

- attention deficit disorder

- high blood pressure
- generalized anxiety disorder
- acid reflux
- testicular hypogonadism
- mixed hyperlipidemia
- erectile dysfunction

11. There is no indication the applicant petitioned to the Army Discharge Review Board for an upgrade of his discharge within that Board's 15-year Statute of limitations.

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 AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

13. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The applicant requests an upgrade his UOTHC discharge to under honorable conditions, general. He contends his misconduct was related to Other Mental Health Issues.

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 enlisted into the Regular Army on 7 August 2001; 2) Effective 15 August 2001, the applicant's unit reported him absent without leave, and on 14 September 2001 he was dropped from the rolls; 3) On 3 April 2002, court-martial charges were preferred against the applicant. The DD Form 458 (Charge Sheet) shows he was charged with absenting himself from his organization from on or about 15 August 2001 and did remain so absent until on or about 31 March 2002; 4) The applicant consulted with legal counsel on 3 April 2002. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, discharge in lieu of trial by court-martial ; 5) On 29 April 2002, the separation authority approved the applicant's request for discharge under the provisions of AR 635-200, Chapter 10 The applicant was discharged accordingly on 29 May 2002, under the provisions of AR 635-200, Chapter 10, by reason of in lieu of trial by court-martial..

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during

the applicant's period of service. Included in the applicant's casefile was a Report of Health Summary, dated 22 May 2023 that reflects BH conditions of ADHD and Generalized Anxiety Disorder, that were added to his health summary of 8 June 2022. The medical records were provided associating either disorder with military service, or suggesting either was exacerbated by military service. JLV was void of any treatment history for the applicant and he does not have a service connected disability.

d. The applicant is requesting an upgrade his UOTHC discharge to honorable. He contends his misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment history for the applicant during service. Post service records shows the applicant diagnosed with Generalized Anxiety Disorder and ADHD on 8 June 2022. Records do not associate the disorders with military service and do not suggest the disorders were exacerbated by military service. In absence of documentation reflecting the applicant met criteria for a BH condition during service or had a condition exacerbated by service, there is insufficient evidence to support the applicant's misconduct characterized by AWOL was related to or mitigated by Other Mental Health Issues. Given that ADHD is most often diagnosed during childhood, there is the possibility that applicant had ADHD during service, however, the disorder would not have impacted the applicant's ability to differentiate between right and wrong and adhere the right, and thus would not have mitigated his misconduct.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. However, the applicant contends his misconduct was related to Other Mental Health Issues, and per liberal guidance, his contention is sufficient to warrant the Board's consideration.

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 his misconduct was related to Other Mental Health Issues and has diagnoses of ADHD and GAD as of 8 June 2022.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during service. Post service records shows the applicant diagnosed with Generalized Anxiety Disorder and ADHD on 8 June 2022. Records do not associate the disorders with military service and do not suggest the disorders were exacerbated by military service. In absence of documentation reflecting the applicant met criteria for a BH condition during service or had a condition exacerbated by service, there is

insufficient evidence to support the applicant's misconduct characterized by AWOL was related to or mitigated by Other Mental Health Issues. Given that ADHD is most often diagnosed during childhood, there is the possibility that applicant had ADHD during service, however, the disorder would not have impacted the applicant's ability to differentiate between right and wrong and adhere the right, and thus would not have mitigated his misconduct.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. The opine noted there is insufficient evidence to support the applicant's misconduct characterized by AWOL was related to or mitigated by Other Mental Health Issues.
2. The Board found no evidence the applicant's disorder would not have impacted the applicant's ability to differentiate between right and wrong and adhere the right, and thus would not have mitigated his misconduct." Furthermore, the Board noted the applicant provided no post service achievements or character letters of support that could attest to his honorable conduct for the Board to weigh as consideration. The Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board denied relief.
3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

3/1/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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

3. AR 15-185 (ABCMR) states 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.

4. AR 635-200, in effect at the time, set forth the primary authority for separating enlisted personnel.

a. Chapter 10 states in part, a member who has committed an offense or offenses, the punishment for any of which, under the UCMJ and the Manual for Court-Martial, include bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. In addition, the request for discharge may be submitted at any stage in the processing of the charges until the court-martial convening authority's final action on the case. Commanders will also ensure that a member will not be coerced into submitting a request for discharge in lieu of trial by court-martial. The member will be given a reasonable time (not less than 72 hours) to consult with a consulting counsel and to consider the wisdom of submitting such a request for discharge.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

5. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 to 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, 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//