

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008045

APPLICANT REQUESTS: an upgrade of her under other than honorable conditions (UOTHC) discharge.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, she experienced anxiety after refusing to render a false statement about an incident in South Korea that involved her, but she did not personally witness. As a result, she was sent on a field training exercise without a weapon and treated like a criminal. On her DD Form 293, the applicant indicates that other mental health conditions are related to her request.
3. On 6 April 2010, the applicant enlisted in the Regular Army for a period of 4 years in the rank/grade of private first class/E-3. Upon completion of initial entry training, she was assigned to a unit in South Korea.
4. A DD Form 458 (Charge Sheet) shows on 25 April 1979, court-martial charges were preferred against the applicant for violation of the Uniform Code of Military Justice (UCMJ), by on or about:
 - 20 February 2011, failing to obey a lawful order from a superior commissioned officer by violating a no contact order
 - 8 February 2011, with intent to deceive, making a false official statement to a Special Agent that she had not witnessed sexual acts the day before
 - 8 February 2011, wrongfully endeavor to impede an investigation by providing a false sworn statement to a Special Agent

- 20 February 2011, wrongfully endeavor to impede an investigation by informing a suspect that Criminal Investigation Division (CID) Special Agents were collecting cell phones
- 14 April 2011, wrongfully concealing her knowledge of a serious offense by not disclosing her knowledge of the indecent acts committed by two Soldiers to CID and failing to make the same known to the civil or military authorities as soon as possible

5. On 11 August 2011, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separations), Chapter 10, for the good of the service in lieu of trial by court-martial. She consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to her. She elected not to submit a statement in her own behalf.

6. The applicant's immediate commander recommended approval of her request for discharge in lieu of trial by court-martial.

7. On 8 August 2011, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with her service characterized as UOTHC. He further directed the applicant's reduction to the lowest enlisted grade.

8. Orders and the applicant's DD Form 214 confirm she was discharged on 22 September 2011, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Code "KFS" and Reentry Code "4." She was credited with completing 1 year, 5 months, and 17 days of net active service this period. She had no time lost. She did not complete her first full term of service.

9. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in lieu of trial by court-martial. In doing so, she would have waived her opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

10. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of her discharge. On 15 May 2012, the applicant was informed that after careful review of her application, military records, and all other available evidence, the ADRB had determined that she was properly and equitably discharged and denied her request.

11. In reaching its determination, the Board can consider the applicant's petition, her service record, and her statements in light of the published guidance on equity, injustice, or clemency.

12. MEDICAL REVIEW:

a. The applicant requests and upgrade of her UOTHC discharge to honorable. She contends her 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 6 April 2010; 2) on 25 April 1979, court-martial charges were preferred against the applicant for violation of the Uniform Code of Military Justice (UCMJ), by on or about:

- 20 February 2011, failing to obey a lawful order from a superior commissioned officer by violating a no contact order.
- 8 February 2011, with intent to deceive, making a false official statement to a Special Agent that she had not witnessed sexual acts the day before.
- 8 February 2011, wrongfully endeavor to impede an investigation by providing a false sworn statement to a Special Agent.
- 20 February 2011, wrongfully endeavor to impede an investigation by informing a suspect that Criminal Investigation Division (CID) Special Agents were collecting cell phones.
- 14 April 2011, wrongfully concealing her knowledge of a serious offense by not disclosing her knowledge of the indecent acts committed by two Soldiers to CID and failing to make the same known to the civil or military authorities as soon as possible.

c. 3) On 11 August 2011, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separations), Chapter 10, for the good of the service in lieu of trial by court-martial; 4) On 8 August 2011, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with her service characterized as UOTHC; 5) Orders and the applicant's DD Form 214 confirm she was discharged on 22 September 2011, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10.

d. The military electronic medical records, AHLTA and MHS Genesis, the VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA/MHS Genesis was void of any BH treatment history for the applicant. A review of JLV was void of any BH treatment history for the applicant and she does not have a service-connected disability. No hardcopy military or civilian BH related records were provided for review.

e. The applicant requests upgrade of her UOTHC discharge to honorable and contends her misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment for the applicant during or after service and she provided no documentation supporting her assertion of Other Mental Health Issues. In absence of documentation supporting her assertion, there is

insufficient evidence to establish that her misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of her discharge characterization.

f. 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 her time in service that mitigated her misconduct. However, she contends her misconduct was related to Other Mental Health Issues, and per liberal guidance her assertion 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 her misconduct was related to Other Mental Health Issues

(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 for the applicant during or after service and she provided no documentation supporting her assertion of Other Mental Health Issues. In absence of documentation supporting her assertion, there is insufficient evidence to establish that her misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of her discharge characterization.

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 her characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence that the applicant had an experience or condition during her time in service that mitigated her misconduct of intent to deceive, making a false official statement to a Special Agent and failing to obey a lawful order from a superior commissioned officer by violating a no contact order.

2. The Board agreed based on the opine, there is insufficient evidence to establish that her misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of her discharge characterization. The

Board noted, the applicant provided no post service achievements or character letters of support attesting to her honorable conduct for the Board to weigh clemency determination. Further the Board determined the applicant's service record exhibits numerous instances of misconduct during her enlistment period for 1 year, 5 months, and 17 days of net active service this period. The Board found 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 to a general under honorable conditions discharge. Therefore, the Board denied relief.

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.

X _____

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. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-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 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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.

c. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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 UOTHC 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. 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 to 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.

7. 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//