

IN THE CASE OF: ██████████

BOARD DATE: 28 February 2024

DOCKET NUMBER: AR20230008192

APPLICANT REQUESTS:

- his under other than honorable conditions (UOTHC) discharge be upgraded to honorable
- the narrative reason or separation be changed to Secretarial Plenary Authority
- the separation code be changed to an appropriate one for Secretarial Plenary Authority
- the reentry code (RE) of 4 be changed to an RE-1
- removal of all derogatory information from his records
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- Reenlistment documents
- Request for Chapter 10
- Headquarters, U. S. Army Armor Center and Fort Knox Orders 052-0191
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Correspondence with the Department of Veterans Affairs (VA) related to a VA Home Loan Guarantee

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 discharge was and is unfair having both procedural and substantive defects.
3. Counsel states the applicant became aware of the existence of the error on his characterization of service upon consultation with an attorney and then was apprised of

the legal errors of his discharge. Applicant has exhausted all administrative remedies under existing law and regulation and requests relief. The applicant wishes his petition to be reviewed and in the interest of equity, fairness, and justice. His discharge has served its purpose.

a. The appeal is based on three errors: the underlying basis of his separation was procedurally defective at the time of discharge; the adverse action, to include the administrative discharge, was unfair at the time; and it is inequitable now.

b. Counsel cites several court cases for procedural reviews and expounds of the requirements for the Board's review and obligations.

c. Counsel outlined the applicant's military history, deployments, alleged reasons for his extended absence without leave (AWOL), and his post service life.

d. Counsel contends that the applicant was discharged without an investigation being completed as a result of a command initiated discharge request under Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. Under paragraph 10-4b, consideration should have been given for potential rehabilitation, his command should have provided him a reasonable time to overcome deficiencies, and his entire records should have been reviewed before taking action. In this case the command rushed to judgment that there was a problem that could not be fixed, and he was not offered or provided rehabilitation and the results of his investigation were never reviewed prior to his discharge.

4. On the applicant's DD Form 149, he indicates mental health issues as contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any documentation of a mental health diagnosis to support the contention.

5. A review of the applicant's service record shows he enlisted in the Regular Army on 27 August 1996 for 3 years. He completed training with award of the military occupational specialty 19K (M1 Armor Crewman) and reenlisted on 8 February 1999. The highest grade he held was E-4.

6. Court-martial charges were preferred against the applicant on 17 November 2000 for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with being absent without leave (AWOL) from on or about 7 August 2000 until on or about 13 November 2000.

7. The applicant consulted with legal counsel on 17 November 2000 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 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 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service – in lieu of trial by court-martial.

b. 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.

c. 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 Department of Veterans Affairs (VA), and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

d. He stated that under no circumstances did he desire further rehabilitation, as he had no desire to perform further military service.

e. He was advised he could submit any statements he desired in his own behalf; however, the applicant waived this right.

8. On 17 November 2000, the applicant's immediate commander recommended approval of the applicant's request for discharge in lieu of trial by court-martial, and that he receive a UOTHC discharge.

9. The separation authority approved the applicant's request for discharge under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial, and directed that the applicant be reduced to the lowest enlisted grade and receive a UOTHC.

10. The applicant was discharged on 25 February 2002 in the grade of E-1. His DD Form 214 shows:

- discharge under the provisions of Army Regulation 635-200, Chapter 10,
- a narrative reason for separation of for the good of the service – in lieu of court martial
- his service was characterized as UOTHC
- a separation code of KFS
- a Reentry Code of 4

- he was credited with 4 years, 11 months, and 29 days of net active service
- he had 465 days of excess leave
- he had 98 lost time due to AWOL.

11. The applicant provided copies of a portion of his service records and several pages related to his attempts to obtain a VA home Loan Guarantee.

12. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he had a mental health condition 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 27 August 1996; 2) The applicant was found AWOL from 7 August-13 November 2000; 5) The applicant was discharged on 25 February 2002, Chapter 10, by reason of For the Good of the Service – in lieu of court martial. His service was characterized as UOTHC.

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 other mental health conditions as a contributing and mitigating factor 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 a mental health condition that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing a mental health condition 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 while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions, 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 that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board through counsel 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 through counsel of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. The opine noted, 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.

2. The applicant's counsel provide no post service achievements or character letters of support that could attest to his honorable conduct for the Board to weigh a clemency determination. Evidence of record shows, at the time of separation, documentation supports the narrative reason for separation, separation code and re-entry code properly identified on the DD Form 214. As such, the Board determined under liberal consideration changes to the applicant's narrative reason, separation code and re-entry code are not warranted. The Board determined the applicant's counsel 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 an honorable discharge. However, during deliberation, the Board determined the applicant had a prior period of honorable service which is not currently reflected on his DD Form 214 and recommended that change be completed to more accurately show his period of honorable service by granting a partial upgrade.

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:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amend the DD Form 214 for the period ending 25 February 2002 by adding the following entries to item 18 (Remarks):

- IMMEDIATE REENLISTMENT THIS PERIOD FROM 19961119 UNTIL 19990205
- CONTINUOUS HONORABLE ACTIVE SERVICE FROM 19961119 UNTIL 19990205

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to

- upgrade of his under other than honorable conditions (UOTHC) discharge to honorable
- narrative reason or separation be changed to Secretarial Plenary Authority
- separation code be changed to an appropriate one for Secretarial Plenary Authority
- the reentry code (RE) of 4 be changed to RE-1
- removal of all derogatory information from his records

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.

ADMINISTRATIVE NOTE(S): N/A

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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. Additionally, applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR, in its discretion, may grant a formal hearing or request additional evidence or opinions whenever justice requires.

4. Army Regulation 600-37 (Unfavorable Information) policies regarding unfavorable information considered for inclusion in official personnel files.

a. It provides for:

- placement of unfavorable information about Army members in individual official personnel files
- ensures that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files
- ensures that the best interests of both the Army and the Soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files

b. The regulation also states:

(1) Once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

(2) Only letters of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted section of the OMPF. Such documents may be appealed on the basis of proof that their intended purpose has been served and that their transfer would be in the best interest of the Army. The burden of proof rests with the recipient to provide substantial evidence that these conditions have been met.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It states that the SPD code of KFS is the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 10, by sentence of a trial by court-martial. The SPD/RE Code Cross Reference Table included in the regulation establishes RE-4 as the proper code to assign members separated with this SPD code.

6. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at that 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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. Paragraph 5-3 (Secretarial Plenary Authority) provides for those Soldiers who desire to leave active duty, but who do not qualify under any other provision of the regulation. Soldiers applying for release from Active Duty using this provision must understand that their request will not be approved unless discharge is clearly "in the best interests of the Army," not necessarily in the best interests of the Soldier. Individual requests which serve only the interest of the Soldier will not be approved except under exceptional circumstances.

d. Chapter 10 of that regulation provided, in pertinent part, 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, an under other than honorable conditions discharge was normally considered appropriate.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR 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//