

IN THE CASE OF: ██████████

BOARD DATE: 27 March 2024

DOCKET NUMBER: AR20230008246

APPLICANT REQUESTS: His under other than honorable conditions (UOTHC) discharge be ungraded.

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)
- Department of Veterans Affairs (VA) Denial letter

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 given to him unfairly. He didn't know that he was given this type of discharge until they sent him the DD Form 214. The reason he was injured was that he was trying to help a female soldier from getting raped and he was beat up. He was in the hospital for 3 days before he woke up. He was seriously hurt and had numerous wounds all over his head that had to be stitched up. He then had to have other surgeries and was given 48 days of convalescent leave and went home to Bardstown. He returned to Fort Knox on the 44th day and was told he was absent without leave (AWOL). He tried to explain about the leave and they left him in the barracks for 2 days after they told him to go home, and he was then discharged. They sent him his DD Form 214 without him being able to fight it.
3. On the applicant's DD Form 149, he indicates traumatic brain injury as contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any documentation to support this contention.

4. The applicant enlisted in Regular Army for 3 years on 5 July 1977. He completed training with the award of military occupational specialty 36H (Dial/Manual Central Office Repairer). He had an immediate reenlistment on 30 May 1980. The highest grade he held was E-4.

5. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on the following dates for the indicated offenses:

- 25 September 1979, for being AWOL from on or about 0730 hours 4 September 1979 until on or about 1530 Hours 7 September 1979; the punishment included reduction to E-3 (suspended for 6 months
- 1 October 1980, for being AWOL from on or about 5 September 1980 until on or about 22 September 1980; his punishment included reduction to E-3

6. Court-martial charges were preferred against the applicant on 14 July 1981 for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 21 February 1981 until on or about 13 July 1981.

7. A DA Form 3822-R (Report of Mental Status Evaluation), dated 15 July 1981, shows he was found to be mentally responsible, able to distinguish right from wrong and to adhere to the right, and had the mental capacity to understand and participate in board proceedings. There were no disqualifying mental defects sufficient to warrant disposition through medical channels. It was recommended that he be administratively discharged.

8. The applicant consulted with legal counsel on 15 July 1981 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 an under other than honorable conditions 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. 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 Department of Veterans Affairs (VA), and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

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

9. On 15 July 1981, 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.

10. The separation authority approved the applicant's request for discharge on 31 July 1981, under the provisions of Army Regulation, 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.

11. The applicant was discharged on 28 August 1981 in the grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of trial court martial and his service was characterized as UOTHC. He was credited with 3 years, 7 months, and 11 days of net active service with 45 days of excess leave and four periods of lost time totaling 185 days. He had continuous honorable active service from 5 July 1977 to 30 May 1980. His awards are listed as the:

- Army Good Conduct Medal
- Army Service
- Noncommissioned Officer Professional Development Ribbon
- Overseas Service Ribbon
- Expert Qualification Badge with Rifle and Hand Grenade Bars

12. The applicant provided a VA letter indicating his request for VA benefits was denied, due to his characterization of service.

13. 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.

14. Based on the assertion on the applicant's petition referring to a traumatic brain injury, the Army Review Boards Agency medical staff provided a medical review for the Board members. See the " REVIEW" section below. This agency does not provide copies of ARBA Medical Staff reviews to applicants and/or their legal representatives prior to adjudication of the case.

15. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 28 August 1981 discharge characterized as under other than honorable conditions. On his DD Form 149, he had indicated that a traumatic brain injury (TBI) is related to this request. He states:

“The discharge was unfairly given to me, I didn't know that! Was given this discharge until they sent me my DD214. At this time, I was trying to help a female Soldier from getting raped and I was beat up. I was in the hospital 3 days before I woke up. I was seriously hurt and had numerous wounds all over my head that had to be stitched up. I then had to have other surgeries and was given 48 days of convalescent leave and I went home to Bardstown.

I went back to Fort Knox on the 44th day and was told I was AWOL [absent without leave]. I tried to explain about the leave and they left me in the barracks for 2 days. After that they told me just to go home, I was discharged, then they sent the DD214 without me being able to fight this.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the regular Army on 5 July 1977 was discharged on 28 August 1981 under the provisions provided in chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel (1 March 1978): Discharge for the Good of the Service – Conduct Triable by Court Martial.

d. The applicant's DD 214 and Part II of his Personnel Qualification Record show multiple periods of AWOL.

e. A Charge Sheet (DA Form 458) shows the applicant was charged with AWOL from 21 February 1981 thru 13 July 1981 (143 days).

f. The applicant underwent a mental status evaluation on 15 July 1981. The provider documented a normal examination, opining the applicant had the mental capacity to

understand and participate in the proceedings, was mentally responsible, and met the retention requirements in chapter 3 of AR 40-501, Standards of Medical Fitness.

g. On 15 July 1981, the applicant voluntarily requested discharge for the good of the service under the provisions of Chapter 10 of AR 635-200. On 31 July 1981, the Commanding General of the U.S Army Armor Center and Fort Knox approved his request with the directives he be reduced in grade to private (E-01) and issued an Under Other Than Honor Conditions Discharge Certificate.

h. No medical documentation was submitted with the application. The applicant's period of service predates the EMR and there are no encounters in JLV.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant claims TBI

(2) Did the condition exist or experience occur during military service? Applicant claims TBI was incurred while in the Army

(3) Does the condition or experience actually excuse or mitigate the discharge? The applicant has submitted no medical documentation indicating a diagnosis of TBI or other mental health condition(s), and none was found in a review of the supporting documentation and the electronic records. Based on review of the medical records, it is the opinion of the Medical Advisor that there is insufficient evidence the applicant incurred a TBI during military service which would mitigate his misconduct. However, per liberal consideration, the applicant's assertion of TBI is sufficient to warrant consideration by the Board.

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 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 medical review, the Board concurred with the advising official finding insufficient evidence the applicant incurred a TBI during military service which would mitigate his misconduct. The opine noted the applicant provided insufficient supporting documentation regarding his TBI claims.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of being AWOL for 143 days. The Board carefully considered the applicant’s prior period of honorable service and his awards and decorations. However, the Board noted the applicant provided no post service achievements or character letter of support attesting to his honorable conduct for the Board to weigh a clemency determination. Furthermore, the Board agreed 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.

3. This board is not an investigative body. The Board determined despite the absence of the applicant’s medical records, they agreed the burden of proof rest on the applicant, however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant contentions of a TBI claim. 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 relief.

4. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

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:

1. In addition to the administrative notes annotated by the Analyst of Record (below the signature), 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 amending the applicant's DD Form 214 for the period ending 26 August 1981, adding the following entries to item 18 (Remarks):

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE ACTIVE SERVICE FROM 770705 UNTIL 800530

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 the applicant's under other than honorable conditions (UOTHC) discharge.

4/8/2024

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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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's records shows he is authorized additional awards not annotated on his DD Form 214 for the period ending 26 August 1981. As a result, amend his DD Form 214 by adding: Korea Defense Service Medal.

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.

4. 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. 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.

5. 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. 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//