

IN THE CASE OF: ██████████

BOARD DATE: 21 March 2024

DOCKET NUMBER: AR20230008487

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general). Additionally, he requests a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- College transcripts
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Medical documents

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 severe depression, addiction, and mental health issues at the time of service. He has since become a doctor, an academic, and is finishing law school. He needs to be of good character to obtain a license.
3. On his DD Form 149, the applicant notes other mental health issues are related to his request.
4. The applicant enlisted in the Regular Army on 9 January 1987, for 3 years. Upon completion of training, he was awarded military occupational specialty 11B (Infantryman). The highest grade he attained was E-3.
5. On 9 July 1987, he self-referred in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for treatment due to alcohol issues.

6. On 22 July 1987 the applicant was reported as absent without leave (AWOL) and remained absent in a desertion status until he was apprehended by civil authorities and returned to military control on 1 December 1987.
7. On 10 December 1987, the applicant voluntarily declined a separation medical examination.
8. Court-martial charges were preferred against the applicant on 14 December 1987, for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with going AWOL from on or about 22 July 1987 until on or about 1 December 1987.
9. On 15 December 1987, 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, for the good of the service. 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 submitted a statement in his behalf, stating he felt his case should be considered for a general discharge. He joined the Army under the assumption that he would be attending Officer Candidate School (OCS), upon the completion of jump school. After completion of the school, it was made clear to him that he was not eligible for OCS due to his non-citizenship (this was not previously cited as a prerequisite). Moreover, he was assigned to Fort Bragg, NC, and he decided to stay in the service and take advantage of the educational opportunities. To his surprise, there were none available at Fort Bragg. He then put in a request for termination which was denied, at which point he felt that he had no other option but to go AWOL.
10. On 21 December 1987, the applicant's commander recommended approval of the applicant's request for discharge in lieu of trial by court-martial.

11. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge on 31 December 1987, and directed his reduction to the lowest enlisted grade with the issuance of a UOTHC discharge.

12. The applicant was discharged on 29 January 1988. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 8 months and 12 months of net active service this period with 132 days of lost time.

13. The applicant provides:

a. College transcripts that detail his post service educational accomplishments.

b. Medical documents from multiple civilian health institutions that show he has been diagnosed and received treatment for a major depressive disorder and an adjustment disorder.

14. 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.

15. 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.

16. MEDICAL REVIEW:

a. Applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149 and supporting documents, his ABCMR Record of Proceedings (ROP), and his separation military documentation.

b. Due to the period of service, there are no active duty electronic medical records available for review.

c. The applicant is not service connected and there are no VA medical records available for review.

d. The applicant submitted post service civilian medical documentation revealing that he was treated for Major Depressive Disorder and an Adjustment Disorder beginning in

October 2014. The documentation indicates that the applicant's Major Depressive Disorder was in full remission by 2018. The submitted medical documentation also revealed post service substance abuse diagnoses to include Sedative Use Disorder, In Full Remission and Alcohol Use Disorder, In Full Remission.

e. After review of all available information, the applicant self-asserts having Depression at the time of military service. While the applicant submitted post-service medical documentation that reveals diagnoses of Major Depressive Disorder and an Adjustment Disorder that were diagnosed 25 years after his separation from the Army, there is no evidence that these conditions existed at the time of military service. Due to the lack of medical evidence to support that the applicant's asserted Depression existed during military service, there is no mitigation for the AWOL that led to the applicant's separation.

Kurta Factors:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. Depression, Adjustment Disorder.

(2) Did the condition exist or experience occur during military service? No. While the applicant asserts having Depression at the time of military service, there is no medical evidence to support that the applicant's asserted Depression existed during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant self-asserts having Depression at the time of military service. While the applicant submitted post-service medical documentation that reveals diagnoses of Major Depressive Disorder and an Adjustment Disorder that were diagnosed 25 years after his separation from the Army, there is no evidence that these conditions existed at the time of military service. Due to the lack of medical evidence to support that the applicant's asserted Depression existed during military service, there is no mitigation for the AWOL that led to the applicant's separation.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's

mental health claim and the review and conclusions of the ARBA BH Advisor. The Board found the evidence of post-service achievements provided by the applicant insufficient in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

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.

6/27/2024

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CHAIRPERSON
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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 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. 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. Paragraph 2-9 states 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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. 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.

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

6. 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.

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, 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//