

IN THE CASE OF: ██████████

BOARD DATE: 27 March 2024

DOCKET NUMBER: AR20230009272

APPLICANT REQUESTS:

- reconsideration of his previous request for an upgrade of his under other than honorable conditions discharge to honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Department of Veterans Affairs (VA) Progress Notes (79 pages)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20110013934 on 2 February 2012.
2. The applicant states he believes at the "time in question," he was suffering from a mental health disorder. He was not afforded an opportunity for proper treatment but was instead reprimanded and court-martialed. His claim was delayed because he was unaware of the mental health condition for which he was suffering nor the available treatment options. He is currently being treated by the VA and taking medication. The applicant marked on his DD Form 149 post-traumatic stress disorder (PTSD) and other mental health as contributing factors related to his request.
3. The applicant provides VA Progress Notes (79 pages) from the Mental Health Clinic for medical treatment received from approximately 23 August 2022 through 11 April 2023.
4. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 5 October 2004.

b. Three DA Forms 4187 (Personnel Action) changed the applicant's duty status as follows:

- 7 November 2007 – present for duty (PDY) to absent without leave (AWOL)
- 7 December 2007 – AWOL to dropped from rolls (DFR)
- 31 March 2008 – DFR to PDY

c. A DD Form 458 (Charge Sheet) shows on 24 April 2008, court-martial charges were preferred on the applicant for one specification of absenting himself with the intent to remain therefrom permanently, on or about 3 November 2007, and remaining so absent in desertion until 31 March 2008.

d. On 7 May 2008, after consulting with legal counsel he requested a discharge in lieu of trial by court-martial under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10. He acknowledged:

- maximum punishment
- he was guilty of the charges against him or of a lesser included offense
- he does not desire further rehabilitation or further military service
- if his request for discharge was accepted, he may be discharged under other than honorable conditions
- he would be deprived of many or all Army benefits, he may be ineligible for many or all benefits administered by the Veterans Administration
- he may be deprived of his rights and benefits as a Veteran under both Federal and State law
- he may expect to encounter substantial prejudice in civilian life

e. On 12 June 2008, the separation authority, consistent with the chain of command recommendations, approved the applicant's request for discharge in lieu of trial by court-martial under the provisions of AR 635-200, Chapter 10. He would be separated with an under other than honorable conditions discharge.

f. On 24 June 2008, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years, 3 months, and 26 days of active service with 145 days of lost time. He was assigned separation code KFS and the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," with reentry code 4. It also shows he was awarded or authorized:

- Global War on Terrorism Service Medal
- Army Service Ribbon

5. On 2 April 2010, the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

6. On 2 February 2012, the ABCMR rendered a decision in Docket Number AR20110013934. The Board noted the applicant's request for a Chapter 10 discharge, even after appropriate and proper consultation with a military lawyer, tends to show he wished to avoid the court-martial and the punitive discharge that he might have received. Thus, his misconduct and his actions to avoid the consequences became the determining factor in the characterization of his service. For that reason, the Board determined there was no basis for granting the applicant's requested relief.

7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

8. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for which, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

9. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he was experiencing mental health conditions including PTSD 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 5 October 2004; 2) On 24 April 2008, court-martial charges were preferred on the applicant for absenting himself with the intent to remain permanently gone from 3 November 2007 until 31 March 2008; 3) The applicant was discharged on 24 June 2008, Chapter 10- In Lieu of Trial by Court-Martial. His service was characterized as UOTHC; 4) On 2 April 2010, the applicant the Army Discharge Review Board reviewed and denied the applicant's request for an upgrade of his UOTHC discharge; 5) On 2 February 2012, the ABCMR reviewed and denied the applicant's request for an upgrade.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service and medical records. The VA's Joint Legacy Viewer (JLV) was examined along with additional hardcopy medical documentation provided by the applicant.

d. The applicant noted mental health conditions including PTSD as a contributing and mitigating factors in the circumstances that resulted in his separation. There was insufficient evidence the applicant reported mental health symptoms while on active service. Prior to the applicant going AWOL, he was seen for a mental status evaluation for a Chapter 14-12 administration separation on 2 August 2007. The applicant was noted to being separated for "disrespect toward NCOs and Officers and a positive urinalysis for cannabis." The applicant was reported to have legal problems related to driving without a license, but he denied any mental health symptoms or a history of a psychiatric condition. The applicant was psychiatrically cleared for any administrative action deemed appropriate by command. The applicant later went AWOL after this evaluation, and there is insufficient evidence the applicant was diagnosed with any mental health condition after returning from being AWOL. A review of JLV provided evidence the applicant has been diagnosed with Major Depression in 2022, and he has been provided treatment. However, he has not been diagnosed with service-connected depression, and he has not been diagnosed with PTSD. 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 mental health conditions including PTSD that contributed to his misconduct. In 2022, the applicant was diagnosed and treated for depression by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing mental health conditions including PTSD 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 any mental health condition including PTSD while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions including PTSD, 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 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 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 beyond self-report the applicant was experiencing any mental health condition including PTSD while on active service, the records are absent sufficient evidence.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and drop from rolls. The applicant provided no pot service achievements or character letters of support for the Board to weigh a clemency determination. Additionally, 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 to honorable. 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.

4/8/2024

X

[Redacted Signature]

CHAIRPERSON

[Redacted Name]

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. Army Regulation (AR) 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.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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. Paragraph 3-7b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.

4. 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, on 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.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

6. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//