

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230009549

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) character of service and a personal appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- DD Form 214 (Report of Separation from Active Duty), for the period ending 16 May 1979
- Statement of support, dated 5 May 2023

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:

a. When he was 9 years old, his mother married a man who beat her unmercifully. The applicant had to learn how to fight a 35 year old man. They lived in terror for years. He had to lie to school officials about his cuts and bruises. On one occasion, the man was sent to a mental institution for 72 hours. When he returned, he beat the applicant's mother and threatened to kill them both. Eventually the applicant and his six siblings were sent to Social Services. His mother was given 30 days to remove the children from the home or they would be taken from her. They left, but they lived in constant fear.

b. He joined the Army to provide for his family. While he was in basic training, the man stole his baby sister and beat his mother on multiple occasions. He went home on weekends to tend to his mother. He tried to be responsible for everything and everyone. His first sergeant was a compassionate man. He recommended the applicant stay away for 45 days and then turn himself in. That way he could avoid a court-martial and protect

his family. When his unit was put on alert for the Falkland Islands, he wanted to serve his country and protect his family. There was no way to do both at the same time.

3. The applicant enlisted in the Regular Army on 4 October 1978. Upon the completion of initial entry training, he was awarded military occupational specialty 11H (Anti-armor Weapons Crewman). The highest rank he attained was private/E-1.

4. Three DA Forms 4187 (Personnel Action) show the following changes in the applicant's duty status:

- Present for duty (PDY) to Absent Without Leave (AWOL), on 2 March 1979
- AWOL to Dropped from the Rolls (DFR), on 31 March 1979
- DFR to PDY, surrendered to military authorities, on 16 April 1979

5. Court-martial charges were preferred against the applicant on 16 April 1979 for a violation of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 2 March 1979 until on or about 15 April 1979.

6. The applicant underwent a mental status evaluation on 18 April 1979. The evaluating provider determined there was no impression of significant mental illness, he was mentally responsible, and had the mental capacity to understand and participated in board proceedings.

7. On that same date, he underwent a medical examination. The relevant Standard Form (SF) 93 (Report of Medical History) and corresponding SF 88 (Report of Medical Examination) show the applicant reported being in good health and was physically qualified for separation.

8. The applicant consulted with legal counsel on 18 April 1979.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, for the good of the service, under the provision of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charges against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding that if his discharge

request were 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.

c. He elected to submit a statement in his own behalf, wherein he stated, he could not cope with the Army due to family problems. He was not happy with the Army and could not afford to risk his future or be hassled by anyone. He had no desire to perform for the military. He understood he would lose his benefits.

9. The applicant's immediate and intermediate commanders recommended approval of the request for discharge for the good of the service and further recommended the issuance of an UOTHC discharge.

10. The separation authority approved the applicant's request for discharge on 8 May 1979 and directed the issuance of a DD Form 794 (UOTHC Discharge Certificate).

11. Accordingly, the applicant was discharged on 16 May 1979, under the provisions of AR 635-200, Chapter 10. His DD Form 214 confirms his service was characterized as UOTHC. He was credited with 6 months of net active service with 71 days of lost time.

12. The applicant provides a statement of support from his mother, dated 5 May 2023, wherein she confirms the applicant's statement of abuse from her husband at the time. [The applicant], being the oldest, took many beatings. This was a traumatic time for her and her seven children, which lasted until around 1980.

13. In the processing of this case, the Army Review Boards Agency (ARBA) sent a letter to the applicant, on 25 September 2023, requesting medical documents to support his contention of other mental health issues. To date, no additional documentation has been received.

14. Administrative separations under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of trial by court-martial. An UOTHC character of service is normally considered appropriate.

15. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting consideration of his request for an upgrade of his under other than honorable (UOTHC) characterization of service.

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:

- The applicant enlisted into the Regular Army on 4 October 1978.
- The applicant had court martial charges preferred against him for AWOL on 16 April 1979, and he voluntarily requested discharge due to family problems. He annotated awareness of the implications to this decision, including loss of benefits.
- The applicant was discharged on 16 May 1979 and was credited with 6 months of net active service.

c. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and hardcopy military documentation provided by the applicant were also examined.

d. The applicant asserts that he was experiencing an undiagnosed mental health condition at the time of his AWOL. He explains that he was under significant distress associated with his mother and six siblings being subjected to abuse by his former stepfather. He offered specific examples of traumatizing experiences at the hands of his stepfather, and he related that he felt he had to protect his mother and younger siblings. There was insufficient evidence the applicant was diagnosed with PTSD or another psychiatric condition while on active service. There was a mental status examination conducted on 18 April 1979 as part of the discharge process, and the applicant was determined to have the capacity to understand and participate in board proceedings and met retention standards. No diagnosis was rendered, and he was cleared for separation. No additional civilian medical documentation was provided.

e. A review of JLV was void of any evidence of mental health documentation.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a

mental health condition while on active service. The applicant did report experiencing traumatic events and significant family stressors while on active service. Avoidant behavior, such as going AWOL, can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Yet, the presence of misconduct is not sufficient evidence of a mitigating mental health condition during active service. However, the applicant contends he was experiencing a mental health condition that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 Behavioral Health Advisor. The applicant provided no evidence of post-service achievements in support of a clemency determination.
3. The Board concurred with the conclusion of the ARBA Behavioral Health Advisor that the evidence does not corroborate the applicant's claim that he was experiencing a mental health condition at the time of his misconduct. However, a majority of the Board found his statement regarding the circumstances that led to his misconduct, as corroborated by his mother, compelling in support of a clemency determination. Based on a preponderance of the evidence, a majority of the Board determined the applicant's character of service should be changed to under honorable conditions (general).
4. The member in the minority found insufficient evidence of mitigating factors and determined the applicant's character of service is 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 Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general).

9/3/2024

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 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, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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. 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 regulation provides the ABCMR may, in its discretion, hold a hearing. 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. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

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.

5. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 sexual assault or sexual harassment was unreported, or 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.

6. 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//