

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230009840

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Two Department of Veterans Affairs (VA) Letters

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 AR20050015723 on 4 May 2006.

2. As new evidence the applicant states he is 100 percent (%) service connected. He was honorably discharged on 28 July 1989. He reenlisted 28 July 1989 to 16 March 1990 with an UOTHC discharge. He thought he had no chance of changing his status on his DD Form 214 (Certificate of Release or Discharge from Active Duty). His claims to the Veterans Administration (VA) were service connected for major depressive disorder due to chronic pain from being a paratrooper. He has a mental condition and depression. He is grateful to the VA for helping him through these rough times and hopes his request is granted. He delayed in changing or looking into the status, he was told that there wouldn't be a change, he would have to live with the UOTHC for life, but he put in the claim 30 April 2021 and was awarded his claims from the VA and received 100% on 2 June 2023.

3. The applicant enlisted in the Regular Army on 28 July 1986 for 3 years. His military occupational specialty was 13B10 (Cannon Crewman).

4. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on 7 September 1989 for being absent without leave (AWOL) on or about 14 August 1988 to 23 August 1988. His punishment consisted of reduction to private 2/E-2, forfeiture of \$158.00 (suspended), extra duty and restriction.

5. The applicant reenlisted on 28 July 1989. In conjunction with this reenlistment the applicant's commander stated the applicant's performance had been good since September 1988. The applicant was attempting to turn himself around and improve himself and recommended he be allowed to reenlist.
6. The applicant served in the Republic of Korea from 15 June 1988 through 26 July 1989.
7. The applicant was absent without leave (AWOL) on 13 September 1989. He was returned to military control and present for duty (PDY) on 28 September 1989. He was AWOL on 29 September 1989 and dropped from the rolls on 12 October 1989.
8. The applicant surrendered to military authorities and was attached/PDY on 20 December 1989.
9. The Medical Statement of Option, dated 20 December 1989 shows the applicant did not desire a separation medical examination.
10. Court martial charges were preferred against the applicant on 21 December 1989. His DD Form 458 (Charge Sheet) shows he was AWOL from on or about 29 September 1989 until 20 December 1989.
11. The applicant consulted with legal counsel on 21 December 1989, 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. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, in for the good of the service, lieu of trial by court-martial. 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 VA, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an undesirable discharge.
 - b. He elected not to submit statements in his own behalf.
12. The applicant's commander recommended approval of his request for discharge for the good of the service-in lieu of trial by court-martial on 9 January 1990. He further recommended a UOTHC discharge. His chain of command recommended a UOTHC discharge.

13. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 19 January 1990. He directed the applicant's reduction to the lowest enlisted grade with the issuance of a UOTHC discharge.

14. The applicant was discharged on 16 March 1990. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service - in lieu of trial by court-martial with Separation Code KFS and Reentry Code 3. His service was characterized as UOTHC. He completed 3 years, 4 months, and 16 days of net active service. He had lost time from 13 September 1989 to 27 September 1989 and 29 September 1989 to 19 December 1989. His awards include the: Army Service Ribbon, Overseas service Ribbon, two Marksmanship Qualification Badges, and the Parachutist Badge.

15. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

16. The applicant provides:

a. VA letter, dated 10 March 2023, shows the applicant had honorable service from 28 July 1986 to 27 July 1989 and UOTHC service from 29 July 1989 to 16 March 1990. He is serviced connected with a combined evaluation of 90%.

b. VA letter, dated 31 May 2023, shows the applicant is service connected for major depressive disorder granted with an evaluation of 70%.

17. On 4 May 2006, the ABCMR determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case were insufficient as a basis for correction of the applicant's records. As a result, his request for relief was denied.

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

19. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he was experiencing mental health conditions that mitigate 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 enlisted in the Regular Army on 28 July 1986; 2) The applicant accepted nonjudicial punishment (NJP) on 7 September 1989 for being AWOL from 14-23 August 1988; 3) The applicant was found AWOL again after reenlisting from 13-28 September 1989; 4) Court martial charges were preferred against the applicant on 21 December 1989 for being AWOL a third time from 29 September-20 December 1989; 5) The applicant was discharged on 16 March 1990, Chapter 10, for the good of the service - in lieu of trial by court-martial. His service was characterized as UO THC; 6) On 4 May 2006, 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 records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. The applicant noted mental health conditions as a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV provided evidence the applicant has been engaged in the VA for physical and mental health care since 2022. There is evidence the applicant has been treated for chronic pain, and he has also been diagnosed and treated for depression related to his experience of his chronic pain. The pain and depression are related to his active service, but there was insufficient evidence the applicant was experiencing the pain or depression during his active service. The applicant has been rewarded service-connected disability for both depression and chronic pain.

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 mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reports experiencing a mental health condition while on active service, which mitigates 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. There is evidence the applicant has been diagnosed with depression related to his chronic pain as the result of injury he incurred while on active service. However, there is insufficient evidence the applicant was experiencing depression or another mental health condition during his active service.

The applicant did go AWOL repeatedly, which can be a sequela to some mental health conditions like depression, 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 mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service. Charges were preferred against the applicant for violating the Uniform Code of Military Justice, authorized to impose a punitive discharge. Specifically, being absent without leave (AWOL) from 29 September 1989 to 20 December 1989. Subsequently, the applicant, through counsel, voluntarily requested a Chapter 10, in lieu of trial by court-martial. The chain of command determined an under other than honorable conditions characterization was appropriate. The Board carefully reviewed the applicant's statement and the medical advising official finding insufficient evidence to support mitigation beyond the applicant's self-assertion. The Board noted the applicant provided no documentation to support his request, including post-service achievements or letters of reference to support clemency. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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 amendment of the ABCMR decision rendered in Docket Number AR20050015723 on 4 May 2006.



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 record shows his DD Form 214, for the period ending 16 March 1990, is missing important entries that affect his eligibility for post-service benefits. As a result, amend the DD Form 214 by adding the following entries in item 18 (Remarks):

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE ACTIVE SERVICE FROM 860728 UNTIL 890727

REFERENCES:

1. Title 10, U.S. Code, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by 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.
2. AR 635-200, Personnel Separations, in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. When a Soldier is discharged before ETS for a reason for which an honorable discharge is discretionary, the following considerations apply. Where there have been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense(s).
 - 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 of that regulation provides that a Soldier who has committed an offense or offenses, the punishment for which includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the Soldier or where required, after referral, until final action by the court-martial convening authority.
3. 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 Service 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. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences.
4. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs 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//