

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 May 2024

DOCKET NUMBER: AR20230011407

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service

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

DD Form 149 (Application for Correction of Military Record)

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 made a wrong decision and blames his absent without leave (AWOL) charge on his age and the alcohol problem he had at the time. He wished the Army would have helped him make a better decision. Although he had numerous letters of commendations for field duty and was a hard worker, he believes he was not quite mature enough to make life-changing decisions during his military service. He is older now, owns a construction company, and employs a lot of young adults with whom he helps make tough decisions. He is the son of a World War II veteran, a brother of the Vietnam conflict, and his spouse was a U.S. Air Force veteran of the Beirut conflict. He volunteers in numerous organizations, including the American Legion, and has earned the respect of his community. He believes his discharge from the Army was the result of insufficient representation. He thanks the Board for their time and asks them for relief. The applicant notes other mental health issues as conditions related to his request.
3. The applicant enlisted in the Regular Army on 2 April 1979, for 3 years. The highest rank/grade he held was private/E-1.
4. Three DA Forms 4187 (Personnel Action) show, effective 23 August 1979, the applicant's unit reported him AWOL, and on 23 September 1979 he was dropped from the rolls as a deserter. His duty status changed to returned to military control when he surrendered to military authorities on 24 September 1979.

5. On 10 October 1979, court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 24 August 1979 and did remain so absent until on or about 24 September 1979.
6. On the same date, 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 uniform code of military justice (UCMJ); the possible effects of a UOTHC 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 Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws. He elected to submit a statement in his own behalf.
 - b. In his statement, the applicant stated that he enlisted in the Army and envisioned serving his country honorably, gaining knowledge and experience, and eventually attaining a good service discharge. However, after hearing that his parents had been evicted from their apartment, he impulsively went AWOL. His father lost his job due to his father having an alcohol problem, and they needed the applicant's help to support them. When he was AWOL, he worked to alleviate his parent's financial problems and gave them his life savings of \$400.00, which only helped them temporarily. He enjoyed being in the Army but believed the welfare of his parents was more important, and he knew he could find work in his hometown to support them. He asked his command to consider the imposition of a UOTHC as enough punishment for his action and said he was sorry that his Army career was ending in that manner.
7. The applicant's immediate commander recommended approval of his request for discharge, and his intermediate and senior intermediate commanders recommended disapproval.
8. On 5 November 1979, the separation authority approved the applicant's request for discharge for the good of the service – in lieu of trial by court-martial with a separation program designator code of “JFS” and directed the issuance of an DD Form 794A (UOTHC Discharge Certificate).

9. On 8 November 1979, the applicant underwent a complete mental status evaluation and medical examination as part of his consideration for discharge due to his misconduct. His mental status evaluation noted, he met the retention standards, was mentally responsible, was able to distinguish right from wrong and adhere to the right and had the mental capacity to understand and participate in board proceedings.

10. The applicant was discharged accordingly on 14 November 1979, under the provisions of Army Regulation 635-200, Chapter 10, administrative discharge - conduct triable by court-martial, with an UOTHC characterization of service in the grade of E-1. He received a separation code of "JFS" and reenlistment code "4." He was credited with 6 months and 12 days of net active service and had lost time from 23 August 1979 to 23 September 1979 during the period covered.

11. 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.

12. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. The applicant requests upgrade of his UOTHC discharge to Honorable. He contends his misconduct was related to Other Mental Health Issues. 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 in the Regular Army on 2 April 1979.
- Three DA Forms 4187 (Personnel Action) show, effective 23 August 1979, the applicant's unit reported him AWOL, and on 23 September 1979 he was dropped from the rolls. His duty status changed to returned to military control when he surrendered to military authorities on 24 September 1979.
- On 10 October 1979, court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 24 August 1979 and did remain so absent until on or about 24 September 1979. On the same date, the applicant consulted with legal counsel and subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation 635-200, Chapter 10, for the good of the service.

- The applicant's immediate commander recommended approval of his request for discharge, and on 5 November 1979, the separation authority approved the applicant's request for discharge for the good of the service – in lieu of trial by court-martial.
- The applicant was discharged accordingly on 14 November 1979, under the provisions of Army Regulation 635-200, Chapter 10, administrative discharge - conduct triable by court-martial, with an UOTHC characterization of service.

b. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Included in the applicant's casefile is a Report of Mental Status Evaluation, dated 8 November 1979, that shows the applicant met the retention standards, was mentally responsible, was able to distinguish right from wrong and adhere to the right and had the mental capacity to understand and participate in board proceedings. Also included in the casefile is a Report of Medical Examination conducted on the same day that shows the applicant medical qualified for administrative separation. No other military BH-related records were available for review. No military BH records were provided for review. A review of JLV was void of any treatment history for the applicant and he does not have a SC disability.

c. The applicant requests upgrade of his UOTHC discharge to Honorable and contends his misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of medical documentation supporting the applicant's assertion that his misconduct was related to Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues.

d. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues, and per liberal guidance his contention is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of medical documentation supporting the applicant's assertion that his misconduct was related to Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues.

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 applicant was charged with commission of an offense (AWOL) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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 correction of the records of the individual concerned.

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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. 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.

3. Army Regulation 635-200, in effect at the time, set forth the primary authority for separating enlisted personnel.

a. Chapter 10 states in part, a member who has committed an offense or offenses, the punishment for any of which, under the UCMJ and the Manual for Court-Martial, include bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. In addition, the request for discharge may be submitted at any stage in the processing of the charges until the court-martial convening authority's final action on the case. Commanders will also ensure that a member will not be coerced into submitting a request for discharge in lieu of trial by court-martial. The member will be given a reasonable time (not less than 72 hours) to consult with a consulting counsel and to consider the wisdom of submitting such a request for discharge.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. An under other than honorable discharge is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct and in lieu of trial by court-martial.

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 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 (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 to those conditions or experiences.

5. 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 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, 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.

//NOTHING FOLLOWS//