

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011506

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

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement, undated
- DD Form 214 (Certificate of Release or Discharge from Active Duty) and UOTHC Discharge Certificate, 17 July 1981
- Medical records (7 pages), 25 March 1989 to 18 May 1989

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:

a. He lost his hearing in his left ear due to ear surgery he had while serving in the Army. After his left ear surgery, his doctor told him he was going to be sent home by bus to recover, but instead, his unit changed his orders and flew him back to Fort Riley. During the flight, he felt a sharp pain in his left ear when the cabin was pressurized. Upon landing, he told his noncommissioned officer that he was hurting. His captain believed he was trying to scam the Army and told him he would never receive a medical discharge.

b. He was discharged from the Army after an infection in his ear stabilized. He continued to have ear infections after his discharge and went to the Department of Veterans Affairs hospital for treatment; he was denied because of his discharge characterization.

c. In 1989, he was taken by ambulance to the University of California-Los Angeles general hospital for life-saving ear surgery after a severe infection entered his membrane, causing his head to swell. He had a 30 percent chance of living, so a left ear mastoid was performed. He now has total hearing loss in his left ear and 50 percent hearing loss in his right ear; if the infection returns, it will be his demise.

d. He believes his command pushed him out of the Army due to his physical hearing loss in his left ear, which was never considered during his discharge from the Army. He asks the Board for relief so he can get care and disability benefits.

3. The applicant enlisted in the Regular Army on 2 January 1980, for 4 years. The highest rank/grade he held was private/E-2.

4. A DA Form 4126-R (Bar to Reenlistment Certificate), shows the applicant was the recipient of two nonjudicial punishments (NJP), had nine incidents of non-payment of just debts, and was involved in and counseled for various other infractions from 27 June 1980 to 12 November 1980 including:

- lying to his noncommissioned officers
- being unprepared for inspection
- being absent from formations
- poor attitude

5. The applicant accepted NJP under the provisions of Article 15 of the Uniform Code of Military Justice, on three occasions for:

a. on or about an undisclosed date, being AWOL. His punishment was forfeiture of \$25.00 pay for one month, and 7 days restriction and extra duty.

b. On or about 30 October 1980, willfully disobeying a lawful order from his superior noncommissioned officer. His punishment was reduction to private/E-1, forfeiture of \$125.00 pay for one month, and 5 days restriction.

c. On or about 3 June 1981, willfully disobeying a lawful order from his superior noncommissioned officer and commissioned officer, and on or about 4 June 1981, failing to go at the time prescribed to his appointed place of duty. His punishment was 14 days extra duty, forfeiture of \$200.00 pay per month for two months (Second month suspended for 30 days).

6. Two DA Forms 4187 (Personnel Action) show the applicant's unit reported him AWOL effective 11 March 1981 and present for duty effective 18 March 1981.

7. On 3 April 1981, the applicant underwent a complete mental status evaluation and medical examination as part of his consideration for discharge due to his misconduct.

a. His mental status evaluation noted, he met retention standards, was mentally responsible, and had the mental capacity to understand and participate in board proceedings.

b. His medical examination noted, chronic otitis media, tympanoplasty left ear, and history of chronic infection left ear due to surgery (i.e., tympanoplasty left).

8. A board of officers was convened on 19 June 1981 and found there was substantial evidence of the applicant's patterns of misconduct involving frequent incidents of discreditable nature with military authorities. The board recommended the applicant be discharged from the military service for misconduct and issued an UOTHC discharge.

9. The applicant was discharged accordingly on 17 July 1981, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), paragraph 14-33b(1), by reason of misconduct – frequent incidents of a discreditable nature with civil or military authorities, with an UOTHC characterization of service in the grade of E-1. He received a separation code of "JKA" and a reenlistment code of "RE-3." He was credited with 1 year, 6 months, and 9 days of net active service during the period covered. He did not complete his first full term of enlistment.

10. Regulatory guidance in effect at the time provided a discharge under other than honorable conditions was normally considered appropriate for Soldier's discharged under the provisions of Army Regulation 635-200, Chapter 14. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

11. 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.

12. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 17 July 1981 discharge characterized as under other than honorable conditions. He states:

“Upgrade discharge to General Under Honorable Condition so that I can get medical care and disability due to surgery on my left ear while I was on active duty and lost my hearing in my left ear. I was pushed out of the military due to my physical hearing loss in the left ear and this was never considered during the discharge from the military.”

c. The Record of Proceedings outlines the applicant’s military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 2 January 1980 and was discharged on 17 July 1981 under authority provided in paragraph 14-33b of AR 635-200, Personnel Separations – Enlisted Personnel: Frequent incidents of discreditable nature with civil or military authorities. His separation code JKA denotes “Pattern of Misconduct.”

d. Because the period of service under consideration, there are no encounters in AHLTA or documents in iPERMS.

e. The applicant underwent a pre-separation Mental Status Evaluation on 3 April 1981. The physician documented a normal examination and opined the applicant had the mental capacity to understand and participated in the proceedings, was mentally responsible, and met the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness.

f. The applicant underwent a pre-separation medical examination on 3 April 1981. The provider documented a normal examination, the applicant history of chronic otitis medial and a left ear tympanoplasty, and found the applicant qualified for separation under chapter 14 of AR 635-200.

g. No contemporaneous medical documentation was submitted with the application. Civilian medical documentation shows the applicant underwent a left ear tympanoplasty on 23 April 1989 for treatment of chronic left ear drainage.

h. JLV shows the applicant is not registered with the VA, and there are no medical diagnoses encounters.

i. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge.

j. It is the opinion of the Agency medical advisor that a discharge upgrade is not warranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

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 that a discharge upgrade is not warranted. The opine noted there is insufficient evidence to support the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations; or that would have failed the medical retention standards.

2. The Board found insufficient evidence of mitigating factors to overcome the misconduct. The Board agreed there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge. The applicant provided no post service achievements or character letters of support for the Board to weigh 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. Therefore, relief was denied.

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.



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, USC, 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, sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. Chapter 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included fraudulent enlistment/reenlistment, conviction by civil court, desertion, absences without leave, or other acts or patterns of misconduct. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed or an unfit medical condition was not the direct or substantial contributing cause of the misconduct.

(1) Paragraph 14-33b(1) provides for the separation of Soldiers when they have patterns of misconduct for frequent incidents of discreditable nature with civil or military authorities.

(2) A discharge UOTHC is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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.

4. 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/NR) 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//