

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 June 2024

DOCKET NUMBER: AR20230011672

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement

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 joined the Army on 9 September 1997 with the intent of making it a career and retiring. Upon arriving at his first duty station, he was labeled as "gay," because he was not like many of the other Soldiers. He was taunted and shamed for over a year and was finally forced out with an "un-truth," that he stole something. He was so afraid to go to jail that he agreed to exit out of the Army. He has lived with the shame of not talking about the Army with family because of the shame. He now requests an upgrade of his discharge. The applicant marked "sexual assault/harassment" as an issue/condition related to his request.
3. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 9 September 1987.
 - b. His DA Form 2-1 shows he was assigned in Germany from 2 April 1988 to 1 April 1991.
 - c. A DD Form 458 (Charge Sheet) shows on 16 May 1990, court-martial charges were preferred on the applicant for one specification of stealing a Nintendo game

system on or about 21 February 1990, a value of \$97.00, the property of Specialist DWM.

d. On 23 May 1990, after consulting with legal counsel he requested a discharge for the good of the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), 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
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading

e. On 6 June 1990, the separation authority approved the applicant's request for discharge for the good of the service under the provisions of AR 635-200, Chapter 10. He would be separated with an under other than honorable conditions discharge and reduced to the lowest enlisted grade.

f. On 17 July 1990, he was discharged from active duty with an under other than honorable conditions characterization of service, in accordance with chapter 10 of AR 635-200. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 10 months, and 9 days of active service. He was assigned separation code KFS and the narrative reason for separation listed as "For the Good of the Service In Lieu of Court-Martial," with reentry code 3.

4. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

5. 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 for the good of the service. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged for the good of the service.

6. 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.

7. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. The applicant indicates harassment as an issue related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the RA on 9 September 1987.
- A DD Form 458 (Charge Sheet) shows on 16 May 1990, court-martial charges were preferred on the applicant for one specification of stealing a Nintendo game system on or about 21 February 1990, a value of \$97.00, the property of Specialist DWM.
- On 23 May 1990, after consulting with legal counsel he requested a discharge for the good of the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10.
- On 17 July 1990, the applicant was discharged from active duty with an under other than honorable conditions (UOTHC) characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 10 months, and 9 days of active service. He was assigned separation code KFS and the narrative reason for separation listed as "For the Good of the Service In Lieu of Court-Martial," with reentry code 3.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed include the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), self-authored statement, and documents from his service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant states he joined the Army on 9 September 1997 with the intent of making it a career and retiring. Upon arriving at his first duty station he was labeled as "gay," because he was not like many of the other Soldiers. He was taunted and shamed for over a year and was finally forced out with an "un-truth," that he stole something. He was so afraid to go to jail that he agreed to exit out of the Army. He has lived with the shame of not talking about the Army with family because of the shame. He now

requests an upgrade of his discharge. The applicant marked "sexual assault/harassment" as an issue/condition related to his request.

e. Due to the period of service, no active-duty electronic medical records were available for review. The VA electronic medical record available for review indicates the applicant is not service-connected likely due to the characterization of his discharge. In addition, the applicant did not provide any medical documentation, including post-military service, substantiating any BH condition.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition/diagnosis. However, the applicant's self-asserted harassment merits consideration by the Board.

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 harassment as an issue related to his request.

(2) Did the condition exist or experience occur during military service? Yes, the self-asserts experiencing harassment since he was labeled as gay.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant did not provide any medical documentation evidencing a BH condition or diagnosis. Regardless of diagnosis, the record indicates court-martial charges were preferred against the applicant for one specification of stealing a Nintendo game system. This misconduct is not part of the natural history or sequelae of any behavioral health condition. And even if the applicant was experiencing harassment, at the time of his misconduct, it does affect one's ability to distinguish right from wrong and act in accordance with the right. However, per Liberal Consideration the applicant's self-assertion of sexual orientation-based harassment merits consideration by the Board.

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 (theft) 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. The Board considered the medical records, any VA documents

provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical reviewer's finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. 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:

<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.

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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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), 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. Issuance of an honorable discharge will be conditioned upon proper military behavior and proficient performance of duty during the member's current enlistment or current period of service with due consideration for the member's age, length of service, grade, and general aptitude.
 - b. A general discharge is a separation from the Army under honorable conditions of an individual whose military record is 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 which, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged for the good of the service.
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.

//NOTHING FOLLOWS//