

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011809

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs Form 21-4138 (Statement in Support of Claim)
- In-service personnel documents
- In-service medical documents

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 was involved in an accident in 1987 and was hospitalized. He was thrown from the rear of a pick-up truck and suffered a head injury. He was only given Tylenol to assist with continuous headaches.
3. On his DD Form 149, the applicant notes traumatic brain injury (TBI) issues are related to his request.
4. Having had prior honorable service in the Army National Guard, the applicant enlisted in the Regular Army on 12 November 1986, for 3 years.
5. On 1 June 1987, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 2 June 1987.
6. On 8 June 1987, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for going AWOL. His punishment included reduction to the grade of E-1, forfeiture of \$153.00-, and 14-days extra duty.

7. A Standard Form 600 (Chronological Record of Medicare) shows the applicant received treatment at the Womack Army Hospital, Fort Bragg, NC on 10 August 1987, for a head injury.
8. On 15 September 1987, the applicant was reported as AWOL a second time, and remained absent until he surrendered to civilian authorities on 20 May 1988.
9. On 10 June 1988, the applicant voluntarily declined a separation medical examination.
10. Court-martial charges were preferred against the applicant on 13 June 1988, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of going AWOL from on or about 15 September 1987 until on or about 20 May 1988.
11. On 14 June 1988, 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 UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.
  - a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service. 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.
  - b. He declined to submit a statement in his own behalf.
12. The applicant's commander recommended approval of the applicant's request for discharge. The commander noted there did not appear to be any reasonable ground to believe that the applicant was, at the time of his misconduct, mentally defective, deranged or abnormal.
13. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 24 June 1988, and directed his discharge UOTHC.

14. The applicant was discharged on 29 July 1988. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reenlistment Codes 3B, 3C, and 3. He completed 1 year and 13 days of net active service this period with 248 days of lost time.

15. 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.

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

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced a traumatic brain injury (TBI) that mitigates his misconduct. 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) Having had prior honorable service in the Army National Guard, the applicant enlisted in the Regular Army on 12 November 1986; 2) On 8 June 1987, the applicant accepted non-judicial punishment for going AWOL; 3) Court-martial charges were preferred against the applicant on 13 June 1988 for going AWOL from 15 September 1987-20 May 1988; 4) The applicant was discharged on 29 July 1988, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

c. The applicant asserts he had experienced a TBI while on active service, which mitigates his misconduct. Following his first incidence of going AWOL, there was evidence the applicant was involved in an accident which resulted in a head injury. The applicant did receive treatment for it, and there was insufficient evidence the applicant continued to demonstrated injury or cognitive impairment as a result.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition or a TBI. In addition, the applicant does not receive any service-connected disability.

e. 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 a condition or experience that mitigates her misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a TBI while on active service which mitigates his misconduct. There is evidence the applicant did experience a head injury after his first incident of going AWOL, but there is insufficient evidence the applicant continued to experience long-term cognitive effects of this injury.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI while on active service which mitigates his misconduct. There is evidence the applicant did experience a head injury after his first incident of going AWOL, but there is insufficient evidence the applicant continued to experience long-term cognitive effects of this injury.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is evidence the applicant did experience a head injury after his first incident of going AWOL, but there is insufficient evidence the applicant continued to experience long-term cognitive effects of this injury. Therefore, there is insufficient evidence the applicant was experiencing a significant injury which would negatively impact his ability to assess the consequences of his continued pattern of misconduct. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### 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 insufficient evidence to support the applicant had a condition or experience that mitigates her misconduct. The opine noted there is evidence the applicant did experience a head injury after his first incident of going

AWOL, but there is insufficient evidence the applicant continued to experience long-term cognitive effects of this injury.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of 248 days of AWOL. The Board noted the applicant provided insufficient evidence of post service achievements or character letters of support for the Board to consider for a clemency determination. The Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year and 13 days of net active service this period. During deliberation the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to honorable. As such, the Board denied relief.

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.

[REDACTED]

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. Section 1556 of Title 10, U.S. Code, 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. 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. 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.

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 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, TBI, 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 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//