

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 May 2024

DOCKET NUMBER: AR20230011890

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

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored statement

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 is requesting an upgrade of the characterization of his service so his daughter can continue her college education. He was able to use his education benefits under the Hazelwood Act, but recently learned that his daughter cannot use it because of the nature of his discharge. [The Hazelwood Act is a Texas State law that provides education benefits for qualifying Veterans, their spouses, and dependent children.] He takes full responsibility for his actions and the events that occurred during the time of his discharge. He also realizes that the Army is under no obligation to grant him this request. However, he would like to provide some insight of the headspace he was in at that time. The applicant indicated on his application that mental health issues are related to his request.

a. He entered the Army at the age of 19 and like many kids at that age he lacked discipline and guidance. He was stationed at Fort Hood and was instantly mentored by one of the best noncommissioned officers that he had come across, Sergeant (SGT) T, who took him under his wing and kept him out of trouble. Things were good until SGT T was reassigned to Japan and it seemed like his military career began to dwindle.

b. He got into a fight with a fellow Soldier and received nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ). As a result, he was demoted in rank and lost half of a month's pay for two months, which caused him to default on his car payments and lose his car.

c. He was dealing with an insurmountable amount of stress and felt he needed a fresh start. He served his punishment and requested a transfer, which was denied because his sergeant major did not want to lose him. He was told that a transfer was not going to happen and without SGT T around to help him, he felt defeated and mentally inept to deal with the military. So, he took the cowardly way out and just left. It is one of the things that he regrets most in his life.

d. He needs this upgrade not for himself, but for his daughter's education. He has tried to be the best American citizen he can possibly be and does not know how to make amends for his act of cowardice but asks that his daughter not have to suffer for the mistake of her father.

3. On 7 November 1995, the applicant enlisted in the Regular Army for a period of 3 years in the rank/grade of private (PV1)/E-1. He was assigned to a unit at Fort Hood, TX.

4. The applicant's duty status changed from:

- Present for Duty (PDY) to Absent Without Leave (AWOL) on 15 June 1997
- AWOL to Dropped from Rolls (DFR) on 16 July 1997

5. A DD Form 553 (Deserter/Absentee Wanted by the Armed Forces) shows the applicant was reported as a deserter to law enforcement agencies effective 16 July 1997. This form shows he held the rank/grade of private (PV2)/E-2 at the time.

6. A DD Form 458 (Charge Sheet) shows on 16 July 1997, court-martial charges were preferred against the applicant for violation of the UCMJ by on or about 15 June 1997, without authority, absenting himself from his organization and remaining so absent.

7. A DD Form 616 (Report of Return of Absentee) shows the applicant was apprehended by civil authorities on 9 February 1998 and returned to military control at Fort Sill, OK.

8. The applicant's available record is void of the specific facts and circumstances surrounding the applicant's separation, to include his voluntarily request for discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial, and the recommendations of his chain of command.

9. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was reduced to private/E-1 effective 29 May 1998 and discharged on 19 June 1998, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Code "KFS" and Reenlistment Code "3." His service was characterized as UOTHC. He was credited with completing 1 year, 10 months, and 28 days of net active service this period. He had time lost due to AWOL from 15 June 1997 to 24 February 1998.

10. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

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

12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. 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 7 November 1995; 2) The applicant was found AWOL from 15 June 1997-till he was returned to military control by civil authorities on 9 February 1998; 3) The applicant's separation packet is unavailable for review. However, the applicant's service record shows that, on 19 June 1998, he was discharged, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Code "KFS" and Reenlistment Code "3." His service was characterized as UOTHC.

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. No additional medical documentation was provided for review.

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 insufficient evidence the applicant has been diagnosed with a service-connected mental health condition or has been awarded any service-connected disability.

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. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of mental health condition or experience.

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. The applicant did go AWOL, which can be a sequela to some mental health conditions, but this is not sufficient to establish a history of a condition during active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of mental health condition or experience. 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:

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 the medical review the Board concurred with the advising official finding insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. The opine noted the applicant did go AWOL, which can be a sequela to some mental health conditions, but this is not sufficient to establish a history of a condition during active service.

2. The Board noted how the applicant accepts responsibility for his actions and was remorseful with his application, demonstrating he understands his actions were not that of all Soldiers. The Board applauds the applicant's post service achievements since his discharge and his attempt to provide his education benefits to his daughter. However, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of being apprehended for over eight months AWOL. 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. Therefore, 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.

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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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.
 - 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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

6. 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 to 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.

7. 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, 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//