

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 July 2024

DOCKET NUMBER: AR20230012343

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

APPLICANT'S SUPPORTING DOCUMENT 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 (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 he will be eligible to receive Veterans benefits. He enlisted at the age of 19 to be a mechanic and service military vehicles but ended up in combat in Saudi Arabia and Iraq. The conditions there were unhealthy, and the circumstances were horrible because of snipers, the potential to be gassed at any time, and landmines. He did not know what to do as a young man who feared for his life at all times. The applicant indicated on his DD Form 149 that post-traumatic stress disorder (PTSD) is related to his request.
3. On 15 June 1989, the applicant enlisted in the Regular Army for a period of 8 years in the rank/grade of private first class (PFC)/E-3. 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 16 November 1992
 - AWOL to Dropped from Rolls (DFR) on 17 December 1992
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 17 December 1992. This form shows he held the grade of private (PV2)/E-2 at the time.

6. A DD Form 458 (Charge Sheet) shows on 13 July 1993, court-martial charges were preferred against the applicant for a violation of the Uniform Code of Military Justice, for absenting himself from his organization, without authority, on or about 17 November 1992, and remaining so absent.

7. A DD Form 616 (Report of Return of Absentee) shows the applicant was apprehended by civil authorities on 10 March 1999, returned to military control, and transferred to the Personnel Confinement Facility 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 26 July 1999, and discharged on 30 August 1999, 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 Reentry Code "3." His service was characterized as UOTHC. He was credited with completing 3 years, 7 months, and 27 days of net active service this period, with time lost due to AWOL from 16 November 1992 until 9 March 1999. He did not complete his first full term of service.

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) discharge. He contends he experienced PTSD 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) The applicant enlisted in the Regular Army on 15 June 1989; 2) On 13 July 1993, court-martial charges were preferred against the applicant for going AWOL on 17 November 1992, and he was returned to military control on 10 March 1999; 3) The applicant's available record is void of the specific facts and circumstances

surrounding the applicant's separation. However, the applicant's DD Form 214 show he was reduced to private/E-1 and discharged on 30 August 1999, Chapter 10, by reason of "In Lieu of Trial by Court-Martial." His service was characterized as UOTHC.

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

c. The applicant asserts he experienced PTSD that mitigates his misconduct while on active service. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV was void of any medical information in regard to the applicant, and he did not provide any additional medical documentation to review.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence beyond self-report the applicant was experiencing a mitigating mental health condition or experience while on 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 a mental health condition or experience.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? No. There is insufficient evidence to support beyond self-report the applicant was experiencing PTSD during his active service. He did go AWOL, which can be an avoidant behavior associated with PTSD. However, the presence of misconduct is insufficient evidence of the presence of a mental health condition. 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 a mental health condition or experience. However, the applicant contends he experienced PTSD while on active service, which mitigates his discharge. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

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

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

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.

a. The applicant's separation packet is not available for review. However, his DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, and his character of service was under other than honorable conditions. He was credited with completing 3 years, 7 months, and 27 days of net active service, with time lost due to AWOL from 16 November 1992 until 9 March 1999. He did not complete his first full term of service. The ABCMR will decide cases on the evidence of record. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The Board found no error or injustice in his available separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewer. The Board concurred with the medical reviewer's finding insufficient evidence beyond self-report the applicant was experiencing a mitigating mental health condition or experience while on active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of a mental health condition or experience. 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 and reason for separation the applicant received upon separation were 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.

█

█

█

█

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. 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 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//