

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 July 2024

DOCKET NUMBER: AR20230012906

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions (UOTHC) discharge
- a video/telephonic appearance before the Board

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 an Army neurologist and a neurologist at an Air Force base determined he was suffering from neurological conditions, and he had orders from a doctor at Fort Carson, CO, to undergo physical therapy, not to be deployed for a training exercise. His platoon sergeant said, "too bad, you are going." Afraid for his deteriorating health and being a young ignorant man at the time, he chose to go absent without leave (AWOL). Prior to this, he was a model Soldier who had earned an Expert Infantryman Badge and received a waiver to be promoted early at a time when waivers were frozen. He loved the Army and still does. He was wrong, but he trusted his leadership who were steering him wrong, instead of looking out for his health. He feels he was pressured into his misconduct which resulted in his discharge UOTHC. A general, under honorable conditions discharge seems more appropriate based upon the circumstances. He has struggled with the characterization of his discharge for years and finally decided to pursue an upgrade.

3. On 7 September 1995, the applicant enlisted in the Regular Army.

4. DA Forms 4187 (Personnel Action) and the applicant's DA Form 2-1 (Personnel Qualification Record - Part II) show the applicant's unit changed his duty status from:

- Present for Duty (PDY) to AWOL on 1 July 1997
- AWOL to Dropped from Rolls (DFR) on 1 August 1997 and reported him as a deserter to law enforcement agencies
- DFR to Returned to Military Control (RMC) on 25 August 1997
- RMC to DFR on 26 August 1997
- DFR to RMC on 12 March 1998 when he surrendered to military authorities and returned to military control

5. A DD Form 458 (Charge Sheet) shows on 6 April 2000, court-martial charges were preferred against the applicant for violation of Article 86 of the Uniform Code of Military Justice (UCMJ) for being AWOL from on or about 1 July 1997 until on or about 25 August 1997; and from on or about 26 August 1997 until on or about 12 March 1998.

6. On 19 March 1998, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him. He elected not to submit statements in his own behalf and reiterated his desire not to undergo a separation medical examination. The applicant's immediate commander recommended approval of his request with the issuance of a discharge UOTHC.

7. On 1 June 1998, the applicant's request for separation underwent a legal review and there were no objections to further processing it in accordance with the unit commander's recommendations.

8. On 1 June 1998, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced from SPC to PV1 prior to the execution of the discharge.

9. He was discharged on 24 June 1998 under the provisions of Army Regulation 635-200, Chapter 10 with an under other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows "In Lieu of Trial by Court-Martial" with Separation Program Designator code "KFS" and Reentry Eligibility code "3." He completed 2 years, 1 month, and 5 days of active 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 shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

12. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to general.

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:

- The applicant enlisted into the Regular Army on 7 September 1995.
- The applicant was AWOL from July 1997 to March 1998. He voluntarily requested discharge under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial.
- The applicant was discharged on 24 June 1998 and was credited with completing 2 years, 1 month, and 5 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he had a neurological condition that required physical therapy, and he was deployed for a training exercise. He stated that his platoon sergeant was going to send him against the recommendation of his medical provider. He related that he was "scared for his deteriorating health" and "young and ignorant," which prompted him to go AWOL. The application did not include any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of medical or mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition at the time of the misconduct. There were no medical or mental health records provided, and there were no records in JLV.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. There were no medical or mental health records provided so there is no evidence to support a nexus between any medical or mental health condition and his behavior of going AWOL. However, the applicant contends he was experiencing 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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with being absent without leave from 1 July 1997 until on or about 25 August 1997; and from on or about 26 August 1997 until on or about 12 March 1998, offenses punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention of an undiagnosed mental health condition; however, reviewed and concurred with the medical advisor's review finding insufficient evidence he experienced a mental health condition while on active service. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was not in error or unjust.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

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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. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
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//