

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20230013160

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

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief
- In-service records
- Department of Veterans Affairs (VA) documents
- Memorandum from Office of the Under Secretary of Defense; subject: Clarifying Guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCMR/NR) Consideration Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017
- Memorandum from Under Secretary of Defense; subject: Guidance to Military DRBs and BCMR/NRs Regarding Equity, Injustice, or Clemency Determinations, dated 25 July 2018

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. Counsel states, in pertinent part:

a. The applicant describes the beginning of his service as awesome. He remembers being in a very good mood and "doing activities with other service members, really just enjoying life." The applicant performed in an outstanding manner and helped keep morale within his tank crew and the platoon at a high level. He was always dependable.

b. In 1983, while testing weapons at an engineer board, a main gun simulator malfunctioned and exploded four inches away from the applicant. The explosion

hospitalized him for three weeks with injuries to his right hand. More specifically, the applicant suffered burns and abrasions to his right thumb, metacarpal area dorsal area, and the rest of the extremities. His medical record indicates he was unable to do push-ups due to the pain radiating to the thumb. He was not released to go back to full duty until five months after his injury.

c. The applicant and his wife were moved to Germany for assignment. Their marriage was already under severe stress. He attributes this, in large part, to the unbearable physical pain he was in. The applicant believes the pain from his right hand injury eventually led to him being diagnosed with his mental health condition, and after that injury, he withdrew from life and didn't care about seeing anyone. The applicant's leadership informed him that his wife was having an affair with another serviceman on the base. They told him that his wife's adultery was unbecoming of a servicemember's wife, and forced the applicant to buy her a plane ticket home back to the U.S. Feeling depressed and desperate, he did something he regrets. He stole \$200 cash from a noncommissioned officer. While awaiting trial for the theft, the applicant requested a "discharge for the good of the service" in the hopes of avoiding trial by court-martial.

d. The applicant's hand injury caused him intense physical pain. This physical pain led to mental anguish and an eventual diagnosis of adjustment disorder with depressed mood. His battles with consistent physical pain along with depression, were too big a strain for his marriage to overcome. His constant pain, aggravation, and hostility deeply hurt their marriage. He was heartbroken, desperate, and depressed. He deeply regrets his wrong decision to steal. He is praying that the Board will take the surrounding circumstances into consideration and how mental health impacted the choices he made.

3. On 28 September 1981, the applicant enlisted in the Regular Army for 4 years. Upon completion of training, he was awarded military occupational specialty 19E (Armor Crewman). The highest grade he attained was E-4.

4. A DA Form 2173 (Statement of Medical Examination and Duty Status) noted the applicant was treated for burns and abrasions to his right hand corneal abrasions to his right eye, on 9 August 1983. He was injured when a simulator went off near him at the unit training area.

5. On 24 January 1985, the applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for disobeying a lawful order from a noncommissioned officer, on or about 18 January 1985. His punishment included reduction to E-3.

6. Court-martial charges were preferred against the applicant on 12 February 1985, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of stealing \$200.00 from a noncommissioned officer, on or about

19 October 1984; and one specification of making a false statement, on or about 19 October 1984.

7. On 7 March 1985, 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 lieu of trial by court-martial. 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 submitted a statement in his own behalf; however, the available record is void of his statement.

8. The applicant was discharged on 29 March 1985. 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 trial by 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 code RE-3. He completed 3 years, 6 months, and 2 days of active service.

10. Additionally his DD Form 214 shows he was awarded or authorized the Expert Marksmanship Rifle Badge (M-16), Hand Grenade Expert Badge, .45 Caliber Pistol Badge, Good Conduct Medal, Army Service Ribbon, Army Achievement Medal, and the Drivers and Mechanics Badge.

11. The applicant provides a VA letter that shows he was granted service connection for treatment only, for various illnesses and injuries, including adjustment disorder with depressed mood, right hand scars, and stiffness of the right hand. This letter is provided in its entirety for the Board's review within the supporting documents.

12. 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.

13. 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.

14. 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 mental health condition 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 28 September 1981; 2) Court martial charges were preferred against the applicant on 12 February 1985 for stealing \$200.00 from a noncommissioned officer and making a false statement on 19 October 1984; 3) The applicant was discharged on 29 March 1985, Chapter 10, for the good of the service – in lieu of trial by 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) and VA and military medical documents provided by the applicant were also examined.

c. The applicant asserts he experienced a mental health condition, which mitigates his misconduct. There is insufficient evidence the applicant was diagnosed with a mental health condition while on active service. There is sufficient evidence the applicant received a significant injury to his hand as a result of a military training exercise. He reports experiencing mental health symptoms as a result of this injury, and they were compounded by marital problems as well.

d. A review of JLV and VA documentation provided by the applicant afforded sufficient evidence the applicant has been diagnosed with service-connected chronic adjustment disorder with depressed mood in 2022 for treatment purposes only. There is insufficient evidence the applicant has engaged in treatment at the VA for this condition.

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 his 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 mental health condition while on active service that mitigates his misconduct. The applicant was diagnosed with service-connected chronic adjustment disorder with depressed mood for treatment purposed only in 2022.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition while on active service that mitigates his misconduct. The applicant was diagnosed with service-connected chronic adjustment disorder with depressed mood for treatment purposed only in 2022.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant experiencing an adjustment disorder with depressed mood, while on active service. However, there is no nexus between an adjustment disorder with depressed mood and his misconduct of theft and making a false statement: 1) these types of misconduct are not a part of the natural history or sequelae of an adjustment disorder; 2) An adjustment disorder does not affect one's ability to distinguish right from wrong and act in accordance with the right. 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:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 stealing property of another Soldier and making a false official statement, 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 reviewed and concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct that led to his discharge while in service; however, there is sufficient evidence beyond self-report he experienced an adjustment disorder with depressed mood despite that condition not having a direct nexus to the applicant's misconduct, the Board granted relief to upgrade the applicant's characterization of service to under honorable conditions (General).

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 29 March 1985 to show his characterization of service as under honorable conditions (General).

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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. Title 10, U.S. Code, Section 1556, 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 DRBs and Service BCM/NRs, 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, traumatic brain injury, 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//