

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 July 2024

DOCKET NUMBER: AR20230013451

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions (UOTHC) to under honorable conditions (general), and a personal appearance before the Board via telephone.

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

- DD Form 149 (Application for Correction of Military Record), 5 September 2023
- self-authored statement
- recruiting documentation
- DD Form 458 (Charge Sheet), 19 August 1976
- separation authority approval document, 23 September 1976
- Orders 86-36, 24 September 1976
- Undesirable Discharge Certificate, 24 September 1976
- DD Form 214 (Report of Separation from Active Duty), 24 September 1976
- character reference, from S.B., 5 September 2023

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, in effect, the Army did not do a physical following a serious car accident; they used an older physical. By self-authored statement, he states:

a. After his first enlistment before leaving for basic training, he was in a critical car accident and was unable to leave for training. His parents informed his recruiter of his car accident where he at the time was in the hospital. After approximately eight months, he met up with his recruiter and was able to enlist, although the recruiter would use an old physical because it was still good for a year.

b. He enlisted and started basic training. One night his back went into a spasm attack, from the previous car accident. He left for home, not informing anyone he was

leaving. He went absent without leave (AWOL) approximately four times, he was punished and sent to the stockade for 30 days. He was young and in pain and he did not know what to do. One of his Drill Sergeants took him to the hospital where he did have x-rays completed and then he went back to the stockade.

b. When he met with an attorney, he did not know what he was signing when the Chapter 10, undesirable discharge request was made. He knows he was put into the Army illegally without a new physical and he did not know how to proceed with that information.

c. He believes if the Army had given him a new physical, they would have never accepted him due to his injuries sustained from his car accident. He has since put blame on himself for the incompetence of the recruiter.

3. The applicant enlisted in the Regular Army on 20 April 1976, for a 3-year period. He was not awarded a military occupational specialty.

4. The applicant consulted with legal counsel on 18 August 1976 and executed a written request for discharge for the good of the service under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10 (Discharge for the Good of the Service). He acknowledged his understanding of the following in his request:

a. He understood that he could request discharge for the good of the service because the charges preferred against him could result in the imposition of a punitive discharge.

b. Prior to completing this request, he was afforded the opportunity to consult with appointed counsel, who fully advised him of the basis for his contemplated trial by court-martial, the maximum punishment authorized under the Uniform Code of Military Justice (UCMJ), of the possible effects of an UOTHC character of service, and of the procedures and rights available to him.

c. He acknowledged that he was making this request of his own free will and had not been subjected to any coercion by any person. Although counsel furnished him legal advice, this decision was his own. Additionally, he elected to submit a statement in his own behalf, referencing his auto mobile accident and back injury, being afraid of his Drill Sergeants, afraid of failing tests as reasons for going AWOL.

5. On 19 August 1976, court-martial charges were preferred against the applicant for violation of the UCMJ. The relevant DD Form 458 (Charge Sheet) shows he was charged with going AWOL on or about:

- 1 May 1976 and remaining AWOL until on or about 28 May 1976
- 2 June 1976 and remaining AWOL until on or about 14 June 1976
- 17 June 1976 and remaining AWOL until on or about 19 June 1976
- 3 July 1976 and remaining AWOL until on or about 16 August 1976

6. The applicant's immediate commander recommended approval of his request for separation and further recommended issuance of an UOTHC discharge. Additionally adding, the applicant was charged with being AWOL totaling 3 months.

7. The applicant's intermediate commanders recommended approval of his request for separation and the separation authority approved the applicant's request for discharge for the good of the service on 23 September 1976. He further approved the applicant be furnished an UOTHC discharge and reduced to the lowest enlisted grade.

8. The applicant was discharged on 24 September 1976, under the provisions of Army Regulation 635-200, Chapter 10, with separation code JFS (in lieu of trial by court-martial) in the grade of E-1. His DD Form 214 shows his character of service was UOTHC. He was credited with 2 months and 11 days of net active service with 85 days of lost time.

9. The applicant additionally provides recruiting documentation referencing his high school graduation and a character reference letter, from his sister, who wrote on his behalf, that the applicant was involved in a car accident, and he was in critical condition around August 20, 1975. She said he had to quit school because walking was difficult, and he could not sit up straight due to the back brace. When he enlisted, to make their father proud, and he did not have to complete a physical. The family was surprised the Army accepted him because of his injuries from the car accident. When he went AWOL, he was afraid and suffering back pain, and felt like a failure. She believes her brother deserves an under honorable conditions (general) discharge and is requesting the Board's consideration.

10. Administrative separations under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service. An UOTHC character of service is normally considered appropriate.

11. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

12. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and

accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 24 September 1976 under other than honorable conditions discharge. The applicant claims he had a preexisting back injury, was put into the Army illegally because he did not have a pre-entrance examination, and so went absent without leave when his back “just went into a spasm attack.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His DD 214 shows he entered the regular Army on 20 April 1976 and was discharged under other than honorable conditions on 24 September 1976 under the provisions provided in chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel (1 December 1975): Discharge for the Good of the Service – Conduct Triable by Court Martial.

d. A charge Sheet (DD Form 458) shows the applicant was charged with four periods of absence without leave.

e. On 18 August 1976, the applicant voluntarily requested discharge for the good of the Service under the provisions of Chapter 10, AR 635-200.

f. The Commanding General of the U.S. Army Training Center Engineer and Fort Leonard Wood approved his request on 23 September 1976 with the directive his service be characterized an under other than honorable conditions.

g. No contemporaneous medical documentation was submitted with the application and his period of service predates the EMR. JLV shows the applicant is not registered with the VA.

h. It is the opinion of the ARBA medial advisor that a discharge upgrade is not warranted.

i. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

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

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

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 that a discharge upgrade is not warranted. The opine noted the applicant claims he had a preexisting back injury, was put into the Army illegally because he did not have a pre-entrance examination, and so went absent without leave when his back "just went into a spasm attack.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of being AWOL for 3 months. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Furthermore, 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 a general under honorable conditions discharge. Therefore, the Board denied relief.

3. 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.



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 ABCMR applicants (and/or their counsel) prior to adjudication.
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 (Personnel Separations - Enlisted Personnel), in effect at the time, provided guidance for the administrative separation of enlisted personnel:

a. Chapter 10 of this regulation provided a member who has committed an offense or offenses, the punishment for which, under the UCMJ and the Manual for Courts-Martial, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the Service. The discharge request may be submitted after court-martial charges are preferred against the member, or, until final action on the case by the court-martial convening authority. A member who is under a suspended sentence of a punitive discharge may also submit a request for discharge for the good of the Service. An UOTHC discharge certificate normally is appropriate for a member who is discharged for the good of the Service. However, the separation authority may direct a general discharge certificate if such is merited by the member's overall record during the current enlistment.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) 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//