

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 July 2024

DOCKET NUMBER: AR20230013685

APPLICANT REQUESTS: in effect, an upgrade of his under honorable conditions (general) characterization of service and a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- Memorandum, U.S. Army Trial Defense Service, Fort Hood, TX, dated 27 January 2003
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 21 February 2003
- Article, [REDACTED] dated 19 February 2018
- Bibliography, [REDACTED], dated 15 April 2021
- Article, [REDACTED] News, [REDACTED] dated 15 February 2023
- Article, [REDACTED], dated 22 March 2023
- Webpage, [REDACTED] dated 7 September 2023
- two statements of support, dated 20 July 2023 and 7 September 2023

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, in effect:

a. During his period of service, he was one of the best in each unit that he served in. He was a squad leader and top in his platoon during basic training. While in Korea, he was fast tracked to the rank of specialist. He competed in the 8th Army Track and Field events and toured the peninsula, competing in running events throughout the year. He was never issued an Article 15 and was highly respected amongst his peers.

b. Upon returning from Korea, he noticed a decline in his health and found a lump he was afraid was cancerous. As a scared 19 year old, he made a bad decision to go home to see his family doctor. The doctor confirmed he had a tumor and advised him to return to Fort Hood, TX, to seek medical attention. He returned to his unit. Within 48 hours, it was confirmed he had cancer. He had surgery and underwent rigorous radiation treatment which destroyed him physically and spiritually. By the end of his treatments, he found himself in defense of his decision to seek medical help without permission. He was given the opportunity to be discharged with a general character of service.

c. Since his discharge, he has strived to be an honorable man. He graduated with honors from [REDACTED], earning his bachelor's degree. He was employed as an ocean lifeguard and considered one of the best on the beach, performing several rescues which resulted in multiple lives being saved. He founded a non-profit, "[REDACTED]," and raises money and awareness for people in his community currently fighting cancer. He is an Master of Arts degree candidate, [REDACTED], teaches English 101 at [REDACTED] University, and is a member of the Veterans group on campus.

d. He served his country honorably and is still serving with honor. As a 19-year old boy who was going through the most frightening experience of his life, he made an error in judgement. It was not a reflection of his character, then or now. He asks for understanding and forgiveness.

3. The applicant enlisted in the Regular Army on 20 June 2000 for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 63M (Bradley Fighting Vehicle Systems Maintainer). The highest rank he attained was specialist/E-4.

4. The applicant was awarded the Army Achievement Medal on 18 September 2001 and 14 November 2001 for meritorious service while serving with Bravo Battery, 5th Battalion, 5th Air Defense, 2nd Infantry Division.

5. The applicant was formally counseled on 25 June 2002 and 9 July 2002 for two occasions of failure to be at his appointed place of duty at the time prescribed.

6. Three DA Forms 4187 (Personnel Action) show the following changes in the applicant's duty status:

- Present for Duty (PDY) to Absent Without Leave (AWOL), on 9 July 2002
- AWOL to PDY, on 10 July 2002
- PDY to AWOL, on 12 July 2002

7. Court-martial charges were preferred against the applicant, on 12 August 2002, for a violation of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL, on or about 12 July 2002 and he continued to remain absent at the time the charges were preferred.

8. The applicant reported back to his unit on 17 September 2002 and was reported as returned to military control/PDY.

9. A radiology exam, dated 20 September 2002, shows the applicant underwent an ultrasound due to a mass in his left testicle. A follow-up examination in the Urology Clinic, on 16 October 2002, shows the applicant underwent a left orchiectomy on 8 October 2002. The record further stated, "doing well; no problems; path[ology] 100 percent (%) seminoma."

10. The result of a urinalysis, conducted on 5 November 2002, shows a urine specimen provided by the applicant tested positive for tetrahydrocannabinol. The applicant was subsequently enrolled in the Alcohol and Drug Abuse Prevention and Control Program.

11. The applicant consulted with legal counsel on 23 January 2003.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of an under other than honorable conditions discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, in lieu of trial by court-martial, under the provision of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. 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 acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Department of Veterans Affairs, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. However, his statement is not available for review in his service record.

12. In a memorandum, from the U.S. Army Trial Defense Service, Fort Hood, TX, dated 27 January 2003, the Defense Counsel stated, the applicant discovered a lump in his testicles in July 2002. Scared, he left Fort Hood and went home to family. He stayed

with his mother and sought treatment from their family physician. Since his return, he had undergone surgery and chemotherapy. He made a grievous error in judgment by not requesting leave, assistance from his chain of command, or healthcare from military providers. An under other than honorable discharge would deprive him of military benefits and make it difficult for him to obtain meaningful civilian employment.

13. On 31 January 2003, the separation authority approved the request for discharge and further directed the issuance of a under honorable conditions (general) characterization of service.

14. The applicant was discharged on 21 February 2003, under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial. His DD Form 214 confirms he received an under honorable conditions (general) characterization of service. He was credited with 2 years, 5 months, and 24 days of net active service, with lost time on 9 July 2002, 12 July 2002 to 11 August 2002, and 12 August 2002 to 16 September 2002.

15. The applicant provides the following:

a. A copy of his DD Form 214, for the period ending 21 February 2003, and the memorandum from Defense Counsel, dated 27 January 2003, which are summarized in the Record of Proceedings above.

b. An article from [REDACTED] dated [REDACTED], that highlights a short film entitled [REDACTED] which was written by the applicant, that explores the inner workings, insights, and inspirations of a man (the applicant) driven and informed [REDACTED] with cancer.

c. A bibliography, for the book [REDACTED] dated [REDACTED] shows the book, a memoir depicting the year in a life suffering from cancer, was written by the applicant.

d. An article from the [REDACTED] News, entitled [REDACTED] dated [REDACTED], tells the applicant's story from his discovery of cancer in the Army, to his second battle with cancer, and the subsequent development of his non-profit organization which helps others in their battles with cancer.

e. An article from [REDACTED] News, dated 22 March 2023, describes the applicant's swim to raise funds for a child with cancer.

f. A webpage [REDACTED] dated 7 September 2023, highlights the applicant's photography services.

g. In two statements of support, dated 20 July 2023 and 7 September 2023, the authors attest to the applicant's moral character. He is an outstanding citizen who has changed lives in his community. The emotional, cognitive, and physical impact of his initial diagnosis of cancer on his character and judgement is to be expected. Our understanding of maladaptive ways of coping have grown significantly. Consideration of these mitigating factors is mandated. Had he been provided post-diagnosis supportive and clinical counseling; he likely would have coped with his life-threatening diagnosis in a more adaptive manner.

16. Administrative separations under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of trial by court-martial. An under other than honorable conditions character of service is normally considered appropriate.

17. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he experienced Other Mental Health Issues 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 20 June 2000 as a 63M Bradley Fighting Vehicle Systems Maintainer and the highest rank he achieved was E-4, 2) he was awarded two Army Achievement Medals in 2001, 3) he was formally counseled in June and July 2002 for failure to be at his appointed place of duty, 4) court-martial charges were preferred against the applicant on 12 August 2002 for being absent without leave (AWOL) on 12 July 2002. He was AWOL at the time of the charges and returned to his unit on or about 17 September 2002, 5) the applicant had a radiology exam dated 20 September 2002 for an ultrasound of his left testicle. A follow-up examination in the Urology clinic on 16 October 2002 documented the applicant underwent a left orchiectomy on 08 October 2002, 6) the applicant had a positive urinalysis for a sample collected on 05 November 2002 for tetrahydrocannabinol and was enrolled in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP), 7) a memorandum from U.S. Army Trial Defense Service, Ft. Hood, TX dated 27 January 2003 asserted the applicant discovered a lump in his testicles in July 2002 and left Ft. Hood to return home with his family and receive medical care from their family physician, 8) the applicant was discharged on 21 February 2003 under the provisions of Army Regulation (AR) 635-200, Chapter 10, in lieu of trial by court-martial.

b. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service ADAPCP enrollment form 8003 (not dated) documented the applicant's performance and behavior as 'fair.' The following reasons for referral were marked on the referral form: red or bleary eyes, unexcused absences, irritability, increased use of excuses, intolerant of co-workers or subordinates, sporadic work, absenteeism, improper use of drugs, unusual excuses or absence, and avoidance of supervisor or associates. There are no additional BH in-service treatment records available for review.

d. VA records were available for review through JLV from 07 October 2002 through 28 June 2024. The applicant is 70% service connected (SC) through the VA for Major Depressive Disorder (MDD). He is also service connected through the VA for a number of physical health conditions, totaling 80% SC. Review of the Disability Benefits Questionnaire (DBQ) dated 25 February 2022 shows the applicant was diagnosed with Major Depressive Disorder, Recurrent, Moderate, with Anxious Distress. It was noted that the applicant endorsed anxiety that his cancer will come back "all the time." Testicular cancer was identified as being related to the understanding or management of the condition. At the time of the visit, it was documented that he was diagnosed with testicular cancer twice, once in 2002 while in-service and again in 2005 post-discharge. Review of JLV indicates that he was diagnosed with cancer a third time in 2015. It was documented in the DBQ that the applicant reported he turned himself back-in to his unit after going AWOL because he was 'so sick.' Additionally, during the evaluation the applicant reported he 'smoked marijuana while being treated with chemotherapy and radiation during the service.' Review of the VA record is indicative that the applicant continues to receive ongoing treatment for depression and has also been diagnosed with Posttraumatic Stress Disorder and Cannabis Dependence, Uncomplicated through the VA.

e. The applicant included media sources describing his struggles with cancer as well as character statements as part of his application. The character statements provided are from individuals who met the applicant following his discharge and speak to his upstanding character and judgment. Of note, one of the letters submitted was provided by a psychologist though is not one of the applicant's treating providers.

f. The applicant is petitioning the Board requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he experienced Other Mental Health Issues that mitigates his misconduct. There are no in-service

treatment records available aside from an ADAPCP enrollment form. Records show that that the applicant was diagnosed with testicular cancer while in-service and again following his discharge. Review of VA records document that the applicant is 70% SC for MDD.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant is 70% service connected through the VA for Major Depressive Disorder with anxious distress.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 70% service connected through the VA with MDD with anxious distress. Service connection and establishes that the condition existed during service.

(3) Does the condition experience excuse or mitigate the discharge? Yes. The applicant is 70% SC through the VA for MDD with anxious distress. Avoidance behaviors are common among anxiety-based conditions and conditions with associated anxiety, of which AWOL is constituted as an avoidance behavior. Additionally, self-medication with substances is commonly associated with depressive disorders. Given the association between depressive disorders and associated anxiety with avoidance and substance use, there is a nexus between the behaviors that led to his discharge and his diagnosis of Major Depressive Disorder with Anxious Distress. As such, BH medical mitigation is supported.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Medical Advisor.
3. The Board found the applicant provided compelling evidence of post-service achievements in support of a favorable clemency determination. The Board also concurred with the conclusion of the medical advising official regarding his misconduct being mitigated by his mental health. Based on a preponderance of the evidence, the Board determined the applicant's character of service should be changed to honorable.

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 a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as honorable.

12/26/2024

X

CHAIRPERSON

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 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, USC, 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. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

4. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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.

5. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 sexual assault or sexual harassment was unreported, or 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//