

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230013704

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded to honorable.

APPLICANT'S SUPPORTING DOCUMENT(S) 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 was being harassed. No one wanted to do anything about it. He was also too young to be in the service. He was discharged when he was only 17 years old. He lists sexual assault/harassment as related to his request.
3. The applicant enlisted in the Regular Army on 30 October 1974 for 3 years. He did not complete initial entry training and was not awarded a military occupational specialty.
4. The applicant was absent without leave (AWOL) on 3 February 1975 and present for duty (PDY) on 5 February 1975. He was again AWOL on 14 February 1975 and dropped from the rolls as a deserter on 15 March 1975. The applicant was accessed on 6 May 1975. The details of his return were not available for review.
5. The Report of Mental Status evaluation dated 19 May 1975 shows the applicant did not have significant mental illness, was mentally responsible, able to distinguish right from wrong, able to adhere to the right, had the mental capacity to understand and participate in board proceedings and met retention standards.
6. Court martial charges were preferred against the applicant on 21 May 1975. His DD Form 458 (Charge Sheet) shows he was charged with AWOL on or about 14 February 1975 until 6 May 1975.

7. The applicant consulted with legal counsel on 21 May 1975 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the Uniform Code of Military Justice (UCMJ); the possible effects of a UOTHC discharge and the procedures and rights that were available to him.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, in for the good of the service, lieu of trial by court-martial. 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 and he may expect to encounter substantial prejudice in civilian life because of a dishonorable discharge.

b. He elected not to submit statements in his own behalf.

8. The applicant's commander recommended approval of the discharge and that an Undesirable Discharge Certificate be issued. The applicant had no rehabilitative potential and should be eliminated from service. The applicant stated his reason for going AWOL was so that he could be out of the Army. He further stated that he still had that objective in mind. The intermediate chain of command recommended approval.

9. The separation authority approved the request for discharge on 3 June 1975 and directed the applicant be reduced to the lowest grade and the issuance of an Undesirable Discharge Certificate.

10. A Statement of Medical Condition, dated 5 June 1975 shows there had been no change in the applicant's medical condition since his last separation examination on 14 May 1975.

11. The applicant was discharged on 6 June 1975. His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service-in lieu of court martial, with Separation Program Designator KFS and Reenlistment Code 3B. His service was characterized as UOTHC. He completed 4 months, and 14 days of net active service this period. He lost time from 3 February 1975 to 4 February 1975 and 14 February 1975 to 5 May 1975.

12. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

13. On 30 May 2024, in the processing of this case, the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal

Investigative and/or Military Police Reports regarding Military Sexual Trauma (MST) pertaining to the applicant.

14. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. He contends sexual harassment as related to his request.

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:

- Applicant enlisted into the U.S. Army Reserve on 30 October 1974.
- The applicant was absent without leave (AWOL) on 3 February 1975 and present for duty (PDY) on 5 February 1975. He was again AWOL on 14 February 1975 and dropped from the rolls as a deserter on 15 March 1975. The applicant was accessed on 6 May 1975. The details of his return were not available for review.
- Court martial charges were preferred against the applicant on 21 May 1975. His DD Form 458 (Charge Sheet) shows he was charged with AWOL on or about 14 February 1975 until 6 May 1975.
- The applicant consulted with legal counsel on 21 May 1975 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the Uniform Code of Military Justice (UCMJ); the possible effects of a UOTHC discharge and the procedures and rights that were available to him. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, in for the good of the service, lieu of trial by court-martial.
- The applicant was discharged on 6 June 1975. His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service-in lieu of court martial, with Separation Program Designator KFS and Reenlistment Code 3B. His service was characterized as UOTHC. He completed 4 months, and 14 days of net active service this period. He lost time from 3 February 1975 to 4 February 1975 and 14 February 1975 to 5 May 1975.

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 states, "he was being harassed. No one wanted to do anything about it. He was also too young to be in the service. He was discharged when he was only 17 years

old.” However, the applicant does not provide any indication/details regarding the nature of the harassment, what occurred, by whom, nor does he provide possible dates or timeframe.

Due to the period of service no active-duty electronic medical records were available for review. A Mental Status Evaluation dated 19 May 1975, shows the applicant did not have significant mental illness, was mentally responsible, able to distinguish right from wrong, able to adhere to the right, had the mental capacity to understand and participate in board proceedings and met retention standards. A medical examination for the purpose of separation, dated 14 May 1975, shows the applicant denied any mental health concerns.

d. The VA’s Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected and no electronic medical records were available for review. On 30 May 2024, in the processing of this case, the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Military Police Reports regarding Military Sexual Trauma (MST) pertaining to the applicant.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts the following mitigating condition, sexual harassment.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service or after his discharge.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is no evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for any mental health condition. In addition, the applicant provides no details regarding his assertion of sexual harassment.

g. Per Liberal Consideration guidelines, the applicant’s assertion of MST/sexual harassment is sufficient to warrant consideration by the Board.

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 the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge.

2. The Board noted, the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board agreed there is no indication the applicant had a significant mental illness, was not mentally responsible, able to distinguish right from wrong, and able to adhere to the right. The Board determined there is insufficient evidence of mitigating factors to overcome the misconduct of going AWOL on multiple occasions. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of his under other than honorable conditions (UOTHC) discharge to a honorable. Therefore, the Board denied.

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 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, 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 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. When a Soldier is to be discharged UOTHC, the separation authority will direct an immediate reduction to private E-1, in accordance with governing regulation.

4. 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 Service 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 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.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//