

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 July 2024

DOCKET NUMBER: AR20230014035

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

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record), 22 August 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, he loved his country and would have served if not for the military sexual trauma, back injuries, and the radioactive chemical explosion that occurred in the tank he was in while at the National Training Center. He was on a profile for several injuries that occurred and was informed he would receive a medical discharge. His separation is a series of events that were beyond his control, and he requests the Board helps him bring honor to his family.
3. On his DD Form 149, he notes post-traumatic stress disorder (PTSD), sexual assault/harassment, and reprisal/whistleblower are related to his request.
4. The applicant enlisted in the Regular Army on 12 May 1993, for a 3 years. He held military occupational specialty of 19K (Armor Crewman) and the highest rank he attained was specialist/E-4.
5. Court-martial charges were preferred against the applicant for a violation of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with one specification of absent without leave (AWOL) from on or about 5 February 1996 and remaining AWOL until on or about 6 March 1996.
6. He consulted with legal counsel on 21 March 1996 and executed a written request for discharge in lieu of trial by court-martial, under the provisions of Army Regulation

(AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10. 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 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 did not elect to submit or not to submit a statement in his own behalf and did not desire a physical evaluation prior to separation.

7. 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 32 days, he surrendered to military authorities.

8. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 6 June 1996. He further directed the applicant be furnished an UOTHC discharge and reduced to the lowest enlisted grade.

9. The applicant was discharged on 25 June 1996, under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty), as amended by a DD Form 215 (Correction to DD Form 214) confirms his character of service was UOTHC, with separation code KFS and reentry code 3. He was credited with 3 years, 1 month, and 125 days of active service with time lost from 5 February to 17 March 1996.

10. Discharges under the provisions of AR 635-200, Chapter 10, are voluntary requests for discharge for the good of the service from the Soldier to avoid a trial by court-martial. An UOTHC character of service is normally considered proper.

11. 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.

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 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 26 June 1996 discharge characterized as under other than honorable conditions and, in essence, a referral to the Disability Evaluation System (DES). He has indicated on his DD 149 that PTSD, Sexual Assault/Harassment, and Reprisal/Whistleblower are issues related to his request. He states in part: "I love my country and would have served for 20 years if not for the MST [military sexual trauma] and back injuries as well as the radioactive chemical explosion that occurred in the tank I was in ...

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 12 May 1993 and was discharged under other than honorable conditions on 26 June 1996 under provisions provided in by chapter 10 of AR 635-200, Personnel Separations – Enlisted Personnel (26 May 1989): Discharge for the Good of the Service. The DD 214 shows 42 days of time lost under 10 USC § 972, from 5 February thru 17 March 1996. The DD 214 does not list a deployment to a hazardous duty pay area.

d. No medical documentation was submitted with the application and his period of service predates the EMR.

e. A Charge Sheet (DD form 458) shows the applicant was charged with absence without leave (AWOL) from 5 February thru 6 March 1996. On 21 March 1996, the applicant voluntarily requested discharge in lieu of trial by court-martial under chapter 10 of AR 635-200. The applicant declined a separation medical examination. On 6 June 2006, the battalion commander approved his discharge with an under other than honorable characterization of service and the directive he be reduced to Private E1.

f. Recent JLV encounters show he has been seeking mental health care on a humanitarian basis. The applicant consistently mentions he was a victim of MST in these clinical encounters and in one he reported that a medic sexually assaulted him during an evaluation. He is VA service connected for neurosis.

g. There is insufficient evidence the applicant had a mental health or other medical condition that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his

discharge. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: Neurosis, and applicant asserts military sexual assault, documented in VA encounters

(2) Did the condition exist or experience occur during military service? YES: Applicant's neurosis has been service connected by the VA and applicant asserts the sexual assault occurred while he was in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? YES: As a history of MST is associated with avoidant behaviors, the condition fully mitigates the period of absence without leave for which he was administratively separated.

BOARD DISCUSSION:

1. The Board determined 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.

2. 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 DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant was charged with commission of offenses (AWOL) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination finding the applicant has been diagnosed with a behavioral health condition that mitigates his misconduct. Based on this finding, the Board determined a general, under honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The

Board further determined that such upgrade did not change the underlying reason for his separation and thus the narrative reason for separation and corresponding codes should not change.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	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 amending the applicant a DD Form 214 for the period ending 25 June 1996 as follows:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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. 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 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. AR 635-200, 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 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. 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. 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//