

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20230015105

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions (UOTHC) discharge
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show a different reentry code
- a personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge from the Armed forces of the United States), with self-authored statement
- Army Service Records (29 pages), dated 30 October 2001 to 22 January 2004
- Audiogram, Hearing Life, dated 13 April 2016
- letter, Colorado Springs Occupational Health Clinic, dated 4 November 2016
- Audiogram (2 copies), dated 21 November 2019

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:

a. He was an exemplary Soldier but encountered some difficulties early in his career. On 14 September 2002, he learned his New Jersey drivers license was suspended due to unpaid parking tickets and his driving privileges were revoked. After a field exercise, on 9 September 2002, he suffered massive hearing loss in both ears. On 18 September 2002, he was diagnosed, advised not to participate in any military occupational specialty (MOS) specific field exercises, and advised he would be reassigned.

b. Because he was an exemplary Soldier, his unit ignored the recommendation. His unit was scheduled to leave for a major field training exercise in October 2002. He was advised if he participated, he could return with irreversible hearing damage. He was ill advised by his supervisory noncommissioned officer to go absent without leave (AWOL) on 30 September 2002, to avert further hearing damage and resolve his license issue in New Jersey. His hearing loss was not addressed, and he was fearful of his future. He made the worst mistake by choosing to go AWOL.

c. Three months after he went AWOL, his unit was activated to go to Afghanistan. He was labeled a deserter. The U.S. Marshals came to his home, he explained his situation, and turned himself in. Upon reporting, he requested to join his unit in Afghanistan. He was denied due to his hearing loss. He started to pursue a medical discharge and was prescribed hearing aids. His command advised him a medical discharge would take too long, and they would not make his time there easy. He was ill advised to accept the "Chapter 10" and pursue a medical review after. He did not fully understand how the specifics of his discharge would affect him after separation.

d. Today, he is a proud member of the Aurora Fire Rescue as a Firefighter. He finished paramedic school and looks forward to an amazing career, despite his hearing loss and the setbacks his discharge has challenged him with. He has worked hard to overcome his challenges. He has never been arrested, charged, or implicated in any illegal activity. He is an outstanding, law abiding citizen. He hopes to receive proper care for his hearing which he so drastically lost.

3. Prior to his enlistment, the applicant underwent a medical examination on 18 November 1999. The examining provider determined the applicant was unqualified for enlistment due to hearing loss. The relevant Standard Form (SF) 88 (Report of Medical Examination), Item 74 (Summary of Defects and Diagnoses) notes the applicant received an approved waiver for hearing on 30 October 2001.

4. The applicant enlisted in the Regular Army on 30 October 2001.

5. A memorandum, dated 14 September 2002, shows the applicant's installation driving privileges were suspended/revoked for a 12 month period as a result of driving on a suspended and or revoked license and failure to obey traffic control device.

6. A memorandum, dated 18 September 2002, states a recent hearing test showed a significant worsening of the applicant's hearing in both ears. It further notes the applicant should have been fitted with preformed hearing protection and further hearing loss, as a result of peacetime training, would be avoided if the applicant wore hearing protection when exposed to noise.

7. The applicant was reported AWOL on 30 September 2002. He was subsequently dropped from the rolls on 29 October 2002. He surrendered to civil authorities on 21 October 2003, was returned to military control, and transferred to Fort Campbell, KY.

8. The applicant underwent a medical examination on 4 November 2003. A DD Form 2807-1 (Report of Medical History) and the corresponding DD Form 2808 (Report of Medical Examination), show he reported being in good health. Hearing loss and migraines were noted in his medical history. The examining provider deemed him medically qualified for separation.

9. Court-martial charges were preferred against the applicant on 9 December 2003, for a violation of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 30 September 2002 until on or about 23 October 2003.

10. The applicant consulted with legal counsel on 11 December 2003.

a. He 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 UOTHC 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 provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), 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 Veterans Administration, 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. There is no statement available for review in the applicant's service record.

11. The applicant's chain of command and the Staff Judge Advocate recommended approval of the request, with the issuance of a UOTHC discharge.

12. On 13 January 2004, the separation authority approved the requested discharge and directed the applicant be reduced to private/E-1 and the issuance of a UOTHC characterization of service.

13. The applicant was discharged on 22 January 2004, under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial. His DD Form 214 confirms his character of service was UOTHC, with separation code KFS and reentry code RE-4. He was credited with 1 year, 1 month, and 25 days of active service, with lost time from 30 September 2002 to 22 October 2003. He was awarded or authorized the:

- Army Achievement Medal
- National Defense Service Medal
- Army Service Ribbon
- Air Assault Badge

14. The applicant provides the following:

a. 29 pages of Army Service Records. Additionally, a U.S. Military Entrance Processing Command form, dated 30 October 2001, shows the applicant failed his initial audiology examination on 18 November 1999, and subsequently received a waiver.

b. Two audiograms, dated 13 April 2016 and 21 November 2019, and a letter from Colorado Springs Occupational Health Clinic, dated 4 November 2019, show the applicant has been diagnosed with high frequency hearing loss in both ears.

15. Discharges under the provisions of AR 635-200, Chapter 10, are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

16. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

17. 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 22 January 2004 discharge characterized as under other than honorable conditions. He states:

"I made a bad choice going AWOL [absent without leave] due to my hearing loss and fear of complete hearing loss by participating in the FTX [field training exercise] in LA. I was misled by my command and my medical hearing loss was not addressed leading me to be fearful of my future in the military and my physical hearing.

I made the worst mistake by choosing to go AWOL I had never been in trouble before or since. Since this mistake I have given my life and dedicated my life to the service of others and now serve as a firefighter in Aurora, CO. Please reference all the additional materials provided."

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 30 October 2001 and was discharged on 22 January 2004 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (1 November 2000): Discharge in Lieu of Trial by Court-Martial.

d. A 18 September 2002 memorandum states the applicant had a significant worsening in his hearing bilaterally, that he should fitted with hearing protection if he had not already, and "Further hearing loss as the result or peacetime training will be avoided if you wear hearing protection when exposed to noise."

e. A Charge Sheet (DD form 458) shows the applicant was charged with a period of absence without leave (AWOL) from 30 September 2002 through 23 October 2003 at which time he surrendered to civilian authorities.

f. Significant bilateral hearing loss was noted on his 4 November 2003 pre-separation Report of Medical History.

g. On 11 December 2003, the applicant voluntarily requested discharge in lieu of trial by court-martial under chapter 10 of AR 635-200. On 13 January 2004, his request was approved by the installation commander of Ft. Campbell.

h. There are no encounters in EMR and JLV shows he is not registered with the VA.

i. It is the opinion of the ARBA medical advisor that a discharge upgrade is not warranted.

j. 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 partial 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 absenting himself from his unit from 30 September 2002 to 23 October 2003, 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 found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board reviewed and concurred with the medical advisor's review finding no mitigation existed based on the applicant's hearing loss. However, based on the published, equity, injustice, and clemency determination guidance, the Board found the applicant's self-authored statement to be compelling, noting his current occupation as a dedicated firefighter and ability to refrain from post-service trouble. Therefore, the Board concluded an upgrade to under honorable conditions (General) was warranted.

2. As it relates to the applicant's request for amendment to his reentry code, the Board concluded the reentry code assigned during his separation processing was appropriate and did not warrant amendment and therefore denied that portion of his request.

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:

1. The Board determined the evidence presented is sufficient to warrant partial 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 22 January 2004, to show his characterization of service as under honorable conditions (General).

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to amending his reentry code.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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 the 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), paragraph 2-11 states applicants do not have the right to a hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

4. AR 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

5. 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.

6. 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//