

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 January 2025

DOCKET NUMBER: AR20240005565

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to general

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)

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, during training, his father passed away. He took emergency leave, and upon his return to post, there was confusion with the paperwork that complicated his ability to care for his family. He was in the process of being out-processed and was advised to leave due to his pregnant wife being close to her due date and the length of travel involved. He personally believes that his discharge was a result of his mental state following his father's passing and the financial hardships his family was facing.
3. The applicant provides VA Form 21-4138, dated 28 February 2024, which is a continuation to item 18 of the DD Form 149.
4. The applicant was asked, via letter from Case Management Division, dated 31 October 2024, to provide a copy of the medical documents that support his mental health issues. As of the date of this writing, medical documents have not been received.
5. A review of the applicant's service record shows:

- a. He enlisted in the Regular Army on 20 August 2007.
- b. DA Forms 4187 (Personnel Action) reflect his duty status changed as follows:
 - From Present for Duty (PDY) to Absent Without Leave (AWOL) effective 14 February 2008
 - From AWOL to PDY, effective 19 February 2008
 - From PDY to AWOL, effective 28 March 2008
 - From AWOL to PDY, effective 1 April 2008
 - From PDY to AWOL, effective 12 May 2008
 - From AWOL to PDY, effective 30 May 2008
 - From PDY to AWOL, effective 7 July 2008
 - From AWOL to Dropped from Rolls (DFR), effective 6 August 2008
 - From DFR to Present for Duty/Returned to Military Control, effective 23 September 2001
- c. DD Form 616 (Report of Return of Absentee) reflects the applicant was apprehended by civilian authorities in Petrolia, Texas on 23 September 2008 and was later transferred to the Personnel Confinement Facility, Fort Sill, Oklahoma.
- d. DD Form 458 (Charge Sheet), dated 2 October 2008, court-martial charges were preferred against the applicant for one specification of being AWOL from 7 July 2008 to 23 September 2008.
- e. On 2 October 2008, the applicant consulted with legal counsel. 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 (UCMJ), the possible effects of an under other than honorable conditions discharge, and the procedures and rights that were available to him. Subsequent to receiving legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), chapter 10, in lieu of trial by court-martial. 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 an undesirable discharge
 - he 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
 - he was advised he could submit any statements he desired in his own behalf; he elected not to submit any statements in his own behalf

f. The separation authority approved the applicant's request for discharge on 1 December 2008, under the provisions of AR 635-200, chapter 10, in lieu of trial by court-martial, and directed that he be administratively reduced to Private E1 and discharged under other than honorable conditions.

g. DD Form 214 (Certificate of Release or Discharge from Active Duty) reflects the applicant was discharged on 19 December 2008, under the provisions of AR 635-200, chapter 10. He completed 1 year, 1 month, and 13 days of active service this period and he had lost time from 7 July 2008 to 23 September 2008. The DD Form 214 also shows in:

- Items 4a (Grade, Rate or rank) and 4b (Pay Grade) show PV1/E-1
- Item 12h (Effective Date of Pay Grade) – 1 December 2008
- Item 26 (Separation Code) - KFS
- Item 27 (Reentry Code) - 4
- Item 28 (Narrative Reason for Separation) - In Lieu of Trial by Court-Martial

5. There is no evidence that the applicant applied to the Army Discharge Review Board for review of his discharge within the board's 15-year statute of limitations.

6. Army Regulation 635-200 states, a member who has committed an offense for which the authorized punishment includes a punitive discharge may submit a request for discharge 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.

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

8. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to general. He contends he experienced a mental health condition that mitigates his misconduct.

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:

- The applicant enlisted into the Regular Army on 20 August 2007.

- The applicant had four periods of AWOL between February and August 2008.
- A Charge Sheet dated 2 October 2008 showed court-martial charges were preferred against the applicant for one specification of being AWOL from 7 July 2008 to 23 September 2008.
- The applicant voluntarily requested discharge in lieu of trial by court-martial.
- The applicant was discharged on 19 December 2008 and completed 1 year, 1 month, and 13 days of active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts his discharge was due to his mental state from his father's passing and his family's hardship, and he indicated "other mental health" as a mitigating factor in his misconduct. The application was void of any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant was escorted to the ER by his command on 19 April 2008 and reported intermittent suicidal ideation with no plan or intent secondary to financial problems and being the provider for his wife and four children (and another child on the way). He completed an initial intake and reported symptoms of depression, anxiety, sleep difficulty, loss of interest in activities, and suicidal thoughts, and he was diagnosed with Adjustment Disorder with anxiety and depressed mood. He attended four sessions where problem-solving and access to social services was provided, and a Mental Status Evaluation was conducted on 5 June 2008 due to the applicant being "chaptered out" of the Army for being AWOL. Documentation showed he was psychiatrically cleared for Chapter 14 separation.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a condition or experience that partially mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a mental health condition at the time of the misconduct, and documentation from his time in service showed he was diagnosed with an Adjustment Disorder with anxiety and depressed mood.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service, and there is documentation to support this assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. A review of military medical and mental health records revealed the applicant reported mental health symptoms, including suicidal ideation, and was diagnosed with and treated for an Adjustment Disorder while on active service. Documentation showed he was under significant financial stress as a 23-year-old married father of four children and his wife was pregnant with a fifth child. A Mental Status Evaluation was conducted on 5 June 2008, prior to his final AWOL in July 2008. Because being AWOL can be a natural sequela to mental health conditions associated with traumatic or significantly stressful events, under Liberal Consideration there is sufficient evidence to support a partial mitigation of the misconduct.

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. One possible outcome was to grant relief and upgrade the discharge to general under honorable conditions based on partial mitigation of the misconduct. However, upon review of the applicant's petition, available military records and medical review, the Board, considered the advising opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a condition or experience that partially mitigates his misconduct.

2. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a mental health condition at the time of the misconduct, and documentation from his time in service showed he was diagnosed with an Adjustment Disorder with anxiety and depressed mood.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service, and there is documentation to support this assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. A review of military medical and mental health records revealed the applicant reported mental health symptoms, including suicidal ideation, and was diagnosed with and treated for an Adjustment Disorder while on active service. Documentation showed he was under significant financial stress as a 23-year-old married father of four children

and his wife was pregnant with a fifth child. A Mental Status Evaluation was conducted on 5 June 2008, prior to his final AWOL in July 2008. Because being AWOL can be a natural sequela to mental health conditions associated with traumatic or significantly stressful events, under Liberal Consideration there is sufficient evidence to support a partial mitigation of the misconduct.

3. The Board, notwithstanding the advising opine finding sufficient evidence to support that the applicant had a condition or experience that partially mitigates his misconduct. The Board recognized the applicant was under significant financial stress as a 23-year-old married father of four, with a fifth child on the way. However, the Board determined that the evidence of mitigation was insufficient to overcome the severity and pattern of misconduct. The Board acknowledged the applicant experienced multiple periods of unauthorized absence (AWOL), culminating in a final AWOL status from 7 July to 23 September 2008. He was apprehended by civilian authorities and returned to military control, after which court-martial charges were preferred. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Furthermore, the Board determined that the applicant's record does not demonstrate evidence of honorable service with the repeated and prolonged AWOL behavior, culminating in a discharge in lieu of court-martial. Therefore, the Board denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	XXX	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	:	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.

X //SIGNED//

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, 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. Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), sets forth the basic authority for the separation of enlisted personnel.

a. 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.

b. 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.

c. 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.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the 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/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. 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 based on equity, injustice, or clemency grounds, BCM/NRs 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.

6. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//