

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230001869

APPLICANT REQUESTS: in effect,

- upgrade of his dishonorable discharge and an amendment of his narrative reason for separation to show he was discharged due to disability with health benefits, pay, and allowances
- personal appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)
- Certification of Birth for his daughter showing she was born on 18 April 1988

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 he is making this request so that he may be eligible for Department of Veterans Affairs (VA) Healthcare. His daughter is employed by the VA and she is helping him enroll at his local VA. He made a terrible mistake when he served. He regrets his poor choices, and he has learned from his mistakes. He would like nothing more than a chance to receive care for his poor health from a VA Medical Center. He requests forgiveness for his mistakes.
3. The applicant's service record shows:
 - a. On 18 May 1973, he enlisted in the Regular Army for 3 years. He held military occupational special (MOS) 11D (Armor Reconnaissance Specialist). He was assigned to Fort Benning, GA, on 20 July 1974.

b. On 1 May 1975, he was issued a Bar to Reenlistment Certificate. His conduct was unsatisfactory, and his efficiency was fair. Additionally, this document shows:

(1) His record of punishment is listed as:

- Article 86 Uniform Code of Military Justice (UCMJ), 21 November 1973, 14 days of extra duty
- Article 86 UCMJ, 5 February 1974, restriction to the company for 14 days
- Article 91 UCMJ, 24 September 1974, 7 days of extra duty and restriction, and reduction to E-2
- Article 86 UCMJ, 27 December 1974, a forfeiture of \$92 pay, and 7 days of extra duty
- Article 86 UCMJ, 14 March 1975, 30 days in Correctional Custody (10 days suspended for 90 days)
- Article 86 UCMJ, 7 January 1975, a forfeiture of \$92 pay, and 7 days of extra duty

(2) Other factual and relevant indicators of “untrainability or unsuitability” indicates he did not seem to respond to corrections made by his supervisors; he showed little respect for the rank of his [chain of command]/superiors.

(3) He declined to submit statements in his own behalf. However, he did indicate he did not think he should be barred from reenlistment, because he wanted to make the Army a career. He believed he could perform his duties better, if given credit for the things he did right, rather than being condemned for the mistakes he made. He believed he could make a career of the Army, if given the chance.

c. On 25 June 1975, he accepted NJP for driving under revocation. His punishment consisted of 7 days of restriction and extra duty, and reduction to pay grade E-2.

d. On 10 July 1975, his bar to reenlistment was approved.

e. Two DA Forms 4187 (Personnel Action), dated 15 September 1975, show the applicant was confined by civil authorities at the Dooley County Jail, Dooley, GA, for possession of a controlled substance, and hit and run. He was released on bond pending trial on 7 November 1975.

f. On 3 December 1975, he accepted NJP, under the UCMJ, for failing to go to his appointed place of duty (Saturday Morning Inspection) at the time prescribed on 1 November 1975. His punishment consisted of reduction to pay grade E-2.

g. Before a general court-martial on 14 November 1975, at Fort Benning, GA, the applicant was found guilty of:

(1) Stealing a Penney's black and white, 19-inch, Solid State television set, of a value of about \$205, the property of a corporal and a Zenith Stereo, AM/FM record player and radio, of a value of about \$95, the property of private first class, between 1 and 3 August 1975.

(2) Stealing a Bradford Ranger 505, 4 inch, black and white television set, of a value of about \$136, the property of private first class, on 22 July 1975.

(3) Stealing two Cheeda G60x14 tires, of a value of about \$200; stealing two Chrome Reverse Wheels of a value of about \$30; and for stealing an RCA Tape Deck, of a value of about \$54 (the total value of about \$284), the property of a private first class, between 30 and 31 July 1975.

(4) Unlawfully entering the room of a private first class and a corporal with the intent to commit a criminal offense, to wit larceny therein, between 1 and 3 August 1975.

(5) The court sentenced him to a dishonorable discharge, reduction to private/E-1, a forfeiture of all pay, and allowances, and confined at hard labor for 36 months. The sentence was adjudged on 5 December 1975.

(6) On 28 January 1976, the sentence was approved, but the execution of that portion thereof adjudging confinement at hard labor in excess of 13 months was suspended for 2 years, at which time, unless the suspension was sooner vacated, the suspended portion shall be remitted without further action. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial was forwarded to The Judge Advocate General of the Army for review by a Court of Military Review pending completion of the appellate review, the accused was confined in the United States Disciplinary Barracks, Fort Leavenworth, KS, or elsewhere as competent authority may direct.

4. The U.S. Army Court of Military Review affirmed the findings and sentence on 10 May 1976.

5. General Court-Martial Order Number 535, issued by Headquarters, U.S. Army Disciplinary Barracks, Fort Leavenworth, KS on 14 June 1976, noted the applicant's sentence had been affirmed and ordered the DD duly executed.

6. Accordingly, on 12 August 1976, the applicant was discharged from the Army. His DD Form 214 (Report of Separation from Active Duty) shows: He was discharged in accordance with Army Regulation 635-200 (Personnel Separations – Enlisted

Personnel), paragraph 11-1, with a dishonorable discharge. He was assigned a separation code of JJD "Court-Martial." He was credited with completing 2 years, 6 months, and 11 days of net active service this period. He had 167 days of lost time, from 2 April 1974, 15 September 1975, 5 December 1975 to 17 May 1976, and 87 days lost prior to his normal expiration term of service date (18 May to 12 August 1976).

7. Title 10, United States Code, Section 1552, as amended does not permit any redress by this Board of the finality of a court-martial conviction and empowers the Board to only change a discharge if clemency is determined to be appropriate.

8. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

9. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), sets forth the basic authority for the separation of enlisted personnel. Chapter 11, provides that a dishonorable discharge will be issued pursuant only to an approved sentence of a general court-martial, after the completion of an appellate review, and after such affirmed sentence has been ordered duly executed.

10. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his dishonorable discharge and an amendment of his narrative reason for separation to show he was discharged due to disability with health benefits, pay, and allowances. The applicant indicated PTSD is related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the Regular Army on 18 May 1973.
- On 1 May 1975, he was issued a Bar to Reenlistment Certificate. His conduct was unsatisfactory, and his efficiency was fair. Six UCMJ misconducts were listed with associated punishments to include 5 for AWOL and 1 for insubordinate conduct toward a leader (see record for details).
- On 25 June 1975, he accepted NJP for driving under revocation.
- On 10 July 1975, his bar to reenlistment was approved.

- DA Form 4187 shows the applicant was confined to civil authorities on 15 September 1975, for pretrial confinement.
- On 3 December 1975, he accepted NJP, under the UCMJ, for failing to go to his appointed place of duty (Saturday Morning Inspection) at the time prescribed on 1 November 1975.
- Before a general court-martial on 14 November 1975, the applicant was found guilty of: 1) Stealing a Penney's black and white, 19-inch, Solid State television set, of a value of about \$205, the property of a corporal and a Zenith Stereo, AM/FM record player and radio, of a value of about \$95, the property of private first class, between 1 and 3 August 1975. 2) Stealing a Bradford Ranger 505, 4 inch, black and white television set, of a value of about \$136, the property of private first class, on 22 July 1975. 3) Stealing two Cheeda G60x14 tires, of a value of about \$200; stealing two Chrome Reverse Wheels of a value of about \$30; and for stealing an RCA Tape Deck, of a value of about \$54 (the total value of about \$284), the property of a private first class, between 30 and 31 July 1975. 4) Unlawfully entering the room of a private first class and a corporal with the intent to commit a criminal offense, to wit larceny therein, between 1 and 3 August 1975.
- The court sentenced him to a dishonorable discharge, reduction to private/E-1, a forfeiture of all pay, and allowances, and confined at hard labor for 36 months. The sentence was adjudged on 5 December 1975. See record for full account of execution and changes to said sentence.
- The applicant was discharged on 12 August 1976 IAW AR 635-200, paragraph 11-1, with a dishonorable discharge.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), DD Form 214, birth certificate of daughter, as well as documents from his service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserted that PTSD is related to his request for upgrade. The applicant is working to get VA benefits. He also highlighted making terrible mistakes when he served, that he regrets his poor choices, and has learned from his mistakes.

e. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR), and no other records were provided to substantiate his claim. There is no evidence to suggest the applicant

ever received mental health care, that he was ever issued a permanent profile or was diagnosed with a condition that did not meet medical fitness standards in accordance with AR 40-501 during his period of service.

f. Per the applicant's VA EHR, he is not service connected, and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. Starting in August of 2022, the applicant's family (primarily his daughter and another caregiver) began engaging the VA, with request for help in getting her father medical care and support for inadequate housing (given his medical needs). The applicant's daughter reached out to the VA on 22 June 2023 notifying the Decedent Affairs Coordinator that the applicant had passed away. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health encounters. His community health summaries and brief VA records reported he was diagnosed with numerous health conditions, to include liver cancer. No other mental health records were provided.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience at the time of service that mitigated his discharge. In addition, the severity of the misconduct outweighs any potential mitigation.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, applicant asserted PTSD was related to his request for an upgrade to his discharge.

(2) Did the condition exist or experience occur during military service? Unclear, the applicant did not state when or how PTSD as related to his request for upgrade.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserted PTSD was related to his request for upgrade but did not provide any other information regarding this assertion. Regardless, per Liberal Consideration guidance, his contention is sufficient to warrant the board's consideration. There is no evidence that the applicant experienced a mitigating condition during his time in service, nor that he's ever been diagnosed with one since. Of note, there is no nexus between his reported mental health condition (PTSD) and committing larceny (x3) or unwanted entry with the intent to commit larceny. This misconduct is not part of the natural history or sequelae of PTSD. And even if PTSD were present at the time of his misconduct, it does not typically affect one's ability to distinguish right from wrong and act in accordance with the right. As suggested in the Kurta memo, the premeditated bad

conduct outweighs relief offered under Liberal Consideration guidance. Upgrade is not recommended.

h. Lastly, there is insufficient evidence to support a referral to IDES process for a mental health condition at this time. The burden of proof is on the applicant to provide contemporaneous evidence that he should have been medically retired or discharged during his time in service. There is insufficient evidence to support the applicant was ever seen or treated for any mental health concern, that he was diagnosed with a med boardable condition, nor that he was ever found unfit for duty, failed medical retention standards, or was placed on a permanent profile. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in medical separation processing.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance 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 before the Board is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents available for review and evidence in the records. The Board considered the frequency and nature of the misconduct, the reason for separation and whether to apply clemency. The Board agreed that documentation available for review is insufficient to support a discharge due to disability. The Board further agreed documentation does not reveal that he was issued a permanent profile or diagnosed with a condition that did not meet medical fitness standards in accordance with applicable regulatory guidance. Based on the lack of documentation showing in-service mitigating factors to overcome the misconduct or evidence of post-service achievements or letters of reference to weigh in support of a clemency determination, the Board concluded that the character of service the applicant received upon separation was not in error or unjust.

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 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, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (ABCMR) to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Court-Martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, United States Code, section 1552, the authority under which this Board acts, the Army Board for Correction of Military Records is not empowered to set aside a conviction. Rather it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency

is determined to be appropriate. Clemency is an act of mercy, or instance of leniency, to moderate the severity of the punishment imposed.

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. Paragraph 2-9 states 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.

4. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel. It provided that a dishonorable discharge would be issued pursuant to an approved sentence of a general or special court-martial, after completion of the appellate review, and the sentence having been affirmed and ordered duly executed.

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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

5. Title 10 United States Code, section 1552 governs operations of the ABCMR. Section f of this provision of law essentially states the authority of the ABCMR only extends to correction of a record. The ABCMR is not empowered to set aside a conviction, rather it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate.

6. 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, 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, on those conditions or experiences.

7. 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, 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.

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.

8. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time

severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

9. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

10. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

11. Title 10, U.S. Code, section 1556 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.

12. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//