

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 October 2023

DOCKET NUMBER: AR20230002763

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

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

- DD Form 149 (Application for Correction of Military Record)
- military service records, dated 9 January 1981 to 31 March 1981 (six pages)

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, in effect, he was assaulted by Second Lieutenant Cxxx, which was not noted in his service record. He suffered from post-traumatic stress disorder (PTSD). He was not given a fair hearing or the opportunity to present information on his own behalf. He never received a trial by court-martial where all the facts in the matter could have been presented. His mental illness was overlooked.

3. The applicant enlisted in the Regular Army on 30 April 1979 for a 3-year period. The highest rank he attained was private first class/E-3.

4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on six occasions:

a. On 25 May 1979, for going from his appointed place of duty without authority, on or about 23 May 1979. His punishment consisted of forfeiture of \$90.00 pay, 10 days of extra duty, and 10 days of restriction.

b. On 15 July 1979, for assaulting Private K.A.B., by striking him with a fist, on or about 6 July 1979. His punishment consisted of 7 days of extra duty, and 7 days of restriction.

c. On 12 June 1980, for willfully damaging a wall by kicking a hole in it, on or about 30 May 1980, and for absenting himself from his unit without authority, on or about 11 June 1980. His punishment consisted of reduction to private/E-2, forfeiture of \$50.00 pay, and confinement in Correctional Custody Facility (CCF) for 7 days.

d. On 7 August 1980, for failure to go at the time prescribed to his appointed place of duty, on or about 1 August 1980. His punishment consisted of reduction to private/E-1, forfeiture of \$121.00 pay, 7 days of extra duty, and 7 days of restriction.

e. On 18 November 1980, for absenting himself from his place of duty, on or about 10 November 1980 until on or about 12 November 1980. His punishment consisted of reduction to private/E-2, forfeiture of \$130.00 pay, 10 days of extra duty, and 10 days of restriction.

f. On 30 December 1980, for disobeying a lawful order and being disrespectful in language to his superior noncommissioned officer, on or about 19 December 1980. His punishment consisted of forfeiture of \$116.00 pay and confinement in CCF for 7 days.

5. Two DA Forms 4187 (Personnel Action) show the following changes in the applicant's duty status:

- Present for Duty (PDY) to Absent Without Leave (AWOL) on 5 January 1981
- AWOL to Dropped from the Rolls on 4 February 1981

6. The applicant was apprehended by civil authorities on 4 March 1981, and he was returned to military control on that same date.

7. The applicant underwent a mental status evaluation on 10 March 1981. The examining provider determined he was psychiatrically cleared for any administrative action deemed appropriate by his commander.

8. A Statement of Option, dated 10 March 1981, shows the applicant elected not to undergo a separation medical examination.

9. Court-martial charges were preferred against the applicant on 11 March 1981 for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) does not include the specific charges preferred against him.

10. The applicant consulted with legal counsel on 11 March 1981.

a. 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, 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, for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), 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 Veteran's Administration (VA), 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. He elected not to submit a statement.

11. On 31 March 1981, the applicant's immediate commander recommended approval of the request for discharge for the good of the service, with a service characterization of UOTHC. The commander cited the applicant's 58-day period of AWOL, apprehension by civil authorities, and disillusionment with the Army as the specific reasons for his recommendation.

12. The separation authority approved the applicant's request for discharge in lieu of court-martial on 3 April 1981, and further directed the issuance a DD Form 794A (UOTHC Discharge Certificate).

13. The applicant was discharged on 14 April 1981, under the provisions of Army Regulation 635-200, Chapter 10, for conduct triable by court-martial. His DD Form 214 confirms a UOTHC characterization of service, with separation code JFS and reenlistment code RE-3B. He was credited with 1 year, 9 months, and 16 days of net active service, with lost time from 5 January 1981 to 3 March 1981.

14. Discharges under the provisions of Army Regulation 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.

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

16. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. The applicant asserts that PTSD mitigates his discharge.

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 into the Regular Army on 30 April 1979.
- The applicant accepted nonjudicial punishment (NJP) on six occasions:
- On 25 May 1979, for going from his appointed place of duty without authority, on or about 23 May 1979
- On 15 July 1979, for assaulting Private K.A.B., by striking him with a fist, on or about 6 July 1979.
- On 12 June 1980, for willfully damaging a wall by kicking a hole in it, on or about 30 May 1980, and for absenting himself from his unit without authority, on or about 11 June 1980.
- On 7 August 1980, for failure to go at the time prescribed to his appointed place of duty, on or about 1 August 1980.
- On 18 November 1980, for absenting himself from his place of duty, on or about 10 November 1980 until on or about 12 November 1980.
- On 30 December 1980, for disobeying a lawful order and being disrespectful in language to his superior noncommissioned officer, on or about 19 December 1980.
- Two DA Forms 4187 show the following changes in the applicant's duty status: Present for Duty (PDY) to Absent Without Leave (AWOL) on 5 January 1981 and AWOL to Dropped from the Rolls on 4 February 1981.

c. The applicant was apprehended by civil authorities on 4 March 1981, and he was returned to military control on that same date.

d. Court-martial charges were preferred against the applicant on 11 March 1981 for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) does not include the specific charges preferred against his request for discharge cites his 58 days AWOL as the charge.

e. On 11 March 1981 he voluntarily requested discharge under AR 635-200, Chapter 10, for the good of the service – in lieu of trial by court martial. It was approved.

f. On 14 April 1981, the applicant was discharged with an UOTHC characterization of service.

g. 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, as well as documents from the applicant's 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.

The applicant asserts that PTSD mitigates his discharge, and more specifically that he was suffering from PTSD at the time of the event and was not in his "right mind." He also contends that he was not given a fair hearing and the ability to present specific information on his behalf, and overall asserts things were not done properly (for example asserts there is no record of him being AWOL and not receiving a trial by court martial). Though, his contentions seem to be inaccurate given he opted to be discharged in lieu of trial by court martial; and the records are present to show his request for this. In addition, there are numerous documents showing he was AWOL.

h. 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). His separation paperwork did contain a few documents. A Statement of Option, dated 10 March 1981, shows the applicant elected not to undergo a separation medical examination. Though, the applicant did complete a mental status evaluation on 10 March 1981. The examining provider determined he was psychiatrically cleared for any administrative action deemed appropriate by his commander, though no other comments or data were documented. No other records were provided to substantiate his claim of PTSD. There is also no evidence he experienced a mitigating or traumatic experience while in the service that would have caused or exacerbated trauma. There is no history of deployments or foreign service. He did reference an assault by a LT but no further data was given and nothing was found in his medical or service records; the only mention of an assault was him assaulting another soldier.

i. Per the applicant's VA EHR, he is not service connected and 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. He did have several engagements with the VA through telephone calls in 2017, looking for assistance with housing and to address significant psychosocial stressors, however, minimal help was available given his status. 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. No other medical records were provided.

j. Based on the available information, it is the opinion of this Agency Behavioral Health Advisor there is insufficient evidence the applicant had a mitigating condition nor experience during his time in service.

Kurta Questions:

1. Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts PTSD mitigates his discharge.

2. Did the condition exist or experience occur during military service? Yes, the applicant asserts he suffered from PTSD at the time of the event.

3. Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts mitigation due to PTSD at the time of events that led to his discharge, and per Liberal Consideration, his contention is sufficient to warrant the board's consideration. However, there is insufficient evidence the applicant has ever been diagnosed with PTSD, any mitigating mental health concern, nor any mental health diagnosis at all. Of note, some of his behaviors are consistent with the natural history and sequelae of several conditions, to include PTSD (avoidance through going AWOL and failure to reports; increased irritability and difficulty with authority as seen through disobeying a direct order and showing disrespect), but this is not sufficient to establish a history of a condition during active service. Also, there is no nexus between PTSD and assaulting another soldier, nor kicking a hole in a wall. This misconduct is not part of the natural history or sequelae of any mental health condition. In addition, PTSD would not typically impair one's ability to distinguish right from wrong and adhere to the right. Based on the available information, this advisor does not recommend mitigation.

BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination.

3. A majority of the Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding much of his misconduct not being mitigated by PTSD. Based on a preponderance of evidence, a

majority of the Board determined the character of service the applicant received upon separation was not in error or unjust.

4. The member in the minority found the applicant's claim regarding assault by a commissioned officer compelling in conjunction with his claimed PTSD. The member in the minority determined the applicant's character of service should be changed to under honorable conditions (general).

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	█	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.

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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, 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 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.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

4. Army Regulation 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.

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 PTSD; 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.

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//