

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 June 2024

DOCKET NUMBER: AR20230002795

APPLICANT REQUESTS: His undesirable discharge (UD) be upgraded.

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

- DD Form 293 (Application for the Review of Discharge) in lieu of the DD Form 149)
- Applicants statement (10 Page)
- Notification of arrest
- Civil Court sentence
- Service Records
- Goldsboro Psychiatric Clinic, PA Mental Residual Functional Capacity Assessment
- Anchor Psychological & Counseling Services, PLLC, payment agreement
- Character references (14)

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 did not steal any money, he only took the change (\$10.00) when he bought gas and the attendant didn't give him the change from a \$20.00 bill. In his ten pages of statements, he related the incident and the court actions noting that if he had gone to the service station to rob it he would have taken all of the money, not just his \$10.00. Prior to this incident, he had never had any negative remarks or write-ups from the military. He believes that because the attendant, the jury, and the judge was in a southern state, he didn't stand a chance of a fair trial. His attorney did not notify the military and he was not given notice of his court date until the actual date of trial. His appointed lawyer did not attempt to refute anything and he did not have a chance to contact any witnesses. As a result of the experiences surrounding the incident, his conviction, and sentence, he has developed post-traumatic stress disorder (PTSD). He states, he did not shoot the attendant as alleged and only took what was rightfully his.

3. On the applicant's DD Form 149, he indicates PTSD, as a contributing and mitigating factor in the circumstances that resulted in his separation.

4. A review of the applicant's service record shows he enlisted in the Regular Army for 2 years on 8 December 1970. He completed training with award of the military occupational specialty 11C (Infantry Indirect Fire Crewman) and completed basic parachute qualification. The highest grade he held was E-3.

5. A 28 December 1971 Hickory Police Department notification states the applicant was arrested and was being held on the charge of Armed Robbery (that occurred on 23 December 1971) of a service station attendant that was shot, but not killed. He was carrying an Authority for Leave in the name, [REDACTED] and an Armed Forces ID with his photo [REDACTED] in name of [REDACTED]. A hearing date of 28 January 1972 was set and bond of \$10,000.00 has been set, and bond had not been posted, and he remained in custody. The police were requesting clarification of his identity.

6. On 11 February 1971, the applicant pled not guilty to the charge of armed robbery but was found guilty of the charge of common law robbery. He was sentenced to confinement for not less than 10 years in the State Prison.

7. On 1 March 1973, the applicant was notified that based on his civilian arrest and conviction his immediate commander was initiating separation proceedings under Army Regulation (AR) 635-206 (Personnel Separations – Discharge – Misconduct (Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion)). The unit commander noted that:

- A number of suspense were necessary due to factors involved in communicating with him in jail, and paperwork was mailed to him by Certified Delivery, return receipt of which they never received back
- On 4 August 1972, he was informed that the applicant had been placed on parole in March 1972 and had disappeared. With this information, the applicant was dropped from the rolls as a deserter
- On 27 February 1973 the Division Adjutant General informed the unit commander that he had not been place on parole and that he was still in confinement. The applicant was immediately assigned to the unit and the unit commander had again started processing him for discharge under AR 635-206 so that he can complete his sentence.

8. On 14 March 1973, the Hickory Police Department formally notified Fort Bragg of the arrest and conviction.

9. On 9 April 1973, the unit commander formally recommended the applicant be separated for a Civil Conviction and the resulting 10 year sentence of confinement.

10. The appropriate authority approved the applicant's discharge recommendation under AR 635-206, paragraph 33a on 19 April 1973 and directed the applicant be issued an Undesirable Discharge Certificate.

11. The applicant was discharged on 8 May 1973, in the pay grade of E-1. His DD Form 214 shows he was discharged under the provisions of AR 635-206, with a separation program number of 284, his service characterization was under conditions other than honorable. He was credited with 1 year, 4 months, and 5 days of net active service. He is shown to have had 492 days of lost time.

12. The Army Discharge Review Board denied the applicant's request for an upgrade on 21 June 1979.

13. The applicant provided the following:

a. A Goldsboro Psychiatric Clinic, Mental Residual Functional Capacity Assessment that afforded him the diagnoses of Post-traumatic Stress Disorder, Major Depression, Prostate Cancer, post operative triple bypass surgery, and hypertension.

b. Anchor Psychological & Counseling Services, PLLC, payment agreement for psychiatric treatments in May 2019.

c. 14 Letter of Character. In the letters the applicant is described as funny, engaging, and thoughtful. He is genuine, has a heart of gold, and his heart is centered on God. He and his wife attended and led the church marriage ministry. He is a dedicated citizen and someone you can depend on and is very caring compassionate diligent and hard-working gentleman. He mentors students and drives both school buses and the church bus whenever necessary. He is a very funny and charismatic person who inspires joy and laughter in moments of despair. It is always a pleasure to be around him, because he will easily put everyone around him in a delightful mood. He has a very special way of making this world a very special place. He has worked as a substitute teacher at the Douglass Academy and is an example of commitment and dedication to students and is both respected and admired by the other teachers.

14. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting consideration of an upgrade of his under other than honorable conditions characterization of service. He contends he experienced PTSD that mitigates his misconduct.

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 8 December 1970.
- The applicant provided documentation showing he was found guilty of the charge of common law robbery on 11 February 1971, following a shooting incident at a service station. He was sentenced to confinement of not less than 10 years in the State Prison.
- The applicant was discharged on 8 May 1973 under the provisions of AR 635-206, with a separation program number of 284, and his service was characterized as under conditions other than honorable. He was credited with 1 year, 4 months, and 5 days of net active service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and hardcopy medical documentation provided by the applicant were also examined.

c. The applicant asserts that he has PTSD as a result of the shooting incident and subsequent events. He requests an upgrade to his undesirable discharge. There is insufficient evidence that the applicant reported or was diagnosed with a mental health condition, including PTSD, while on active service, specifically prior to his misconduct of robbery and shooting a civilian.

d. A review of JLV was void of mental health documentation. A hard copy of a capacity assessment dated 3 June 2019 provided by the applicant was also reviewed. This document appears to be a disability evaluation that asserts impairment in various aspects of occupational and social functioning. The evaluation lists symptoms of PTSD, including nightmares, flashbacks, panic attacks, sleep disruption, hypervigilance, intrusive thoughts, and exaggerated startle response. It also indicates that the applicant has received medication management treatment via psychiatric medications. The report does not include explanation of the trauma experience that the applicant's symptoms are attributed to, but it does note that these symptoms began in 1973. The concluding diagnoses are Post-traumatic Stress Disorder and Major Depressive Disorder. The applicant also included documentation of a Payment Agreement and billing statement with Anchor Psychological & Counseling Services, LLC. It appears that the applicant attended three psychotherapy visits in May 2019 with diagnostic codes reflective of PTSD, and he was scheduled for three future appointments in July 2019. However, there is no documentation of the content of those visits, treatment summaries, or symptom presentation to support the diagnosis.

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

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts that he has PTSD as a result of his misconduct of robbery and shooting as well as the subsequent legal events, which included lack of support from the military and an unfair trial due to racial discrimination. He provided sufficient evidence of diagnosis and treatment for PTSD since 2019.

(2) Did the condition exist or experience occur during military service? Yes. The applicant asserts he was experiencing PTSD while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is sufficient evidence the applicant was diagnosed with PTSD after his discharge as a result of his misconduct of robbery, shooting a civilian, and the negative consequences of these actions. However, there is insufficient evidence the applicant was experiencing a mental health condition, including PTSD, prior to his misconduct. In addition, there is no nexus between PTSD and the applicant's misconduct of robbery and shooting a civilian in that: 1) these types of misconduct are not part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the applicant's chain of command recommended his separation for misconduct due to his civil conviction. He had been found guilty of the charge of common law robbery. He was sentenced to confinement for not less than 10 years in the State Prison. As a result, he was separated from active duty and received an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the reviewing medical official. The Board concurred with the medical official's finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. Also, the applicant provided insufficient evidence of post-service

achievements or letters of reference of a persuasive nature, and that outweigh his misconduct, in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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, 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, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 635-206, in effect at the time, set forth the basic authority for separation of enlisted personnel for misconduct due to fraudulent entry, conviction by civil court, AWOL, or desertion. Action to separate an individual was to be taken when, in the judgment of the commander, it was clearly established that rehabilitation was impractical or was unlikely to produce a satisfactory Soldier. This regulation prescribed that an undesirable discharge was normally issued unless the particular circumstances warranted a general or an honorable discharge.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other

corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//