

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 July 2024

DOCKET NUMBER: AR20230003997

APPLICANT REQUESTS: in effect, an upgrade of his under other than honorable conditions discharge. Also, a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 was a young and dumb kid and did not know better. He is not educated and cannot explain his situation or problem in words. He would be very grateful.
3. The applicant enlisted in the Regular Army on 8 October 1980.
4. His duty status was changed several times on DA Form 4187 (Personnel Action) as follows:
 - Present for duty (PDY) to Absent without leave (AWOL) on 6 February 1981
 - AWOL to AWOL Confined to Civil Authorities (CCA) on 28 February 1981 (DA Form 2-1 (Personnel Qualification Record) shows in item 27 (Remarks) he was apprehended for suspicion of driving a stolen vehicle
 - AWOL CCA to PDY on 17 March 1981
 - PDY to AWOL on 1 June 1981
 - AWOL to AWOL CCA on 2 June 1981

5. Court documents show the applicant was charged with burglary in the second degree. The specification that he did unlawfully, willfully, burglariously and feloniously, break and enter into a certain building located at #20 Mission Blvd., Apt. M-XX, in the City of Lawton, Comanche County, Oklahoma, owned by and in possession of D.C., doing business as, Regency Arms Apartments, in which building property of value as kept and contained, by kicking open the outer door of said building and entering without the consent of said owner, with the willful, felonious and burglarious intent to steal said property, or to commit any, felony.

6. A Special Court Martial (SPCM) convened on 26 June 1981. He was found guilty of:

- Being AWOL from 6 February 1981 until 17 March 1981
- Wrongfully and without authority wear upon his uniform the insignia of grade of a sergeant of the United States Army on or about 26 March 1981
- Resist being lawfully apprehended by Sergeant First Class W.W.P. on or about 26 March 1981
- Failed to go at the time prescribed to his appointed place of duty (morning formation) on or about 6 May 1981
- He was sentenced to confinement at hard labor for four months and to have the sum of \$100 per month for three months detained for three months, and the be reprimanded

7. On 26 June 1981, his duty status was changed from AWOL CCA to CCA.

8. On 14 July 1981, the applicant presented with attorney was found competent, advised of the charge and punishment, advised of his right to jury trial (waived), advised of his right to confront the witness and to remain silent. He voluntarily entered a plea of guilty. The state accepted his plea. He was advised of his rights to pre-sentence investigation. His sentencing date is listed as 18 August 1981 (Record is void of sentencing).

9. On 15 July 1981, SPCM Order Number 93, shows the sentence was approved and was duly executed but the execution of that portion thereof that provides for confinement at hard labor in excess of confinement at hard labor for 60 days is suspended for six months, at which time, unless the suspension is sooner vacated, the suspended portion of the sentence is remitted without further action.

10. His immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14 for misconduct. The applicant's acknowledgement is void of his record.

11. On 1 September 1981, his immediate commander-initiated separation action to discharge him prior to his expiration term of service for misconduct. The specific reason for separation was his conviction in civil court leaves no other alternative as to the action that can be taken. The crime of burglary is punishable by more than 1 year in accordance with the Uniformed Code of Military Justice, this, and AR 635-200, are grounds for elimination from the United States Army.

12. On 4 September 1981, the chain of command recommended approval. His intermediate commander stated the applicant was convicted by a civil court. He received a three-year sentence in the state penitentiary. One year of which will be served with the remaining two being deferred.

13. On 11 September 1981, having been advised by consulting counsel of the basis for the contemplated action to separate him for misconduct in accordance with Chapter 14 of AR 635-200, and its effects; of the rights available to him; and the effect of waiving said rights. He waived consideration of his case by an administrative separation board. He understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him. He may be ineligible for many or all benefits as a veteran under both Federal and State laws.

14. On 6 October 1981, the separation authority approved discharge and directed an under other than honorable conditions discharge be issued.

15. Accordingly, on 14 October 1981, he was discharged under other than honorable conditions, under the provisions of AR 635-200, chapter 14. His DD Form 214 shows he completed 6 months and 12 days net active service this period. He was awarded or authorized: Army Service Ribbon, Marksman Marksmanship Qualification Badge (Hand Grenade); and Sharpshooter Marksmanship Qualification Badge (Rifle M-16). It also shows:

- Item 26 (Separation Code): JKB
- Item 27 (Reenlistment Code): RE-3B
- Item 28 (Narrative Reason for Separation): Misconduct – Conviction by Civil Court
- Item 29 (Dates of Time Lost During this Period): 810206 – 810316 (6 February 1981 – 16 March 1981), 810601 – 811014 (1 June 1981 – 14 October 1981)

16. On 24 March 1997, the Army Discharge Review Board (ADRB) after careful consideration of his military records and all other available evidence, determined that he was properly and equitably discharged. Accordingly, his request for a change in the character and/or reason of his discharge was denied.

17. The applicant claimed behavioral health conditions and post-traumatic stress disorder in his application, however; no documentation was received to support this claim.

18. There is no available evidence indicating he was issued a permanent profile or was diagnosed with a condition that did not meet medical fitness standards in accordance with AR 40-501 (Standards of Medical Fitness) during his period of service.

19. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

20. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

21. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The DVA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the DVA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the DVA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

22. By law (10 USC section 1552), court-martial convictions stand as adjudged or modified by appeal through the judicial process. 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.

23. 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.

24. By regulation, AR 15-185 (ABCMR) applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge.

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 8 October 1980.
- The applicant's duty status was changed several times on DA Form 4187 (Personnel Action) as follows:
 - Present for duty (PDY) to Absent without leave (AWOL) on 6 February 1981
 - AWOL to AWOL Confined to Civil Authorities (CCA) on 28 February 1981 (DA Form 2-1 (Personnel Qualification Record) shows in item 27 (Remarks) he was apprehended for suspicion of driving a stolen vehicle
 - AWOL CCA to PDY on 17 March 1981
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- Court documents show the applicant was charged with burglary in the second degree. The specification that he did unlawfully, willfully, burglariously and feloniously, break and enter into a certain building located at #20 Mission Blvd., Apt. M-XX, in the City of Lawton, Comanche County, Oklahoma, owned by and in possession of D.C., doing business as, Regency Arms Apartments, in which building property of value as kept and contained, by kicking open the outer door of said building and entering without the consent of said owner, with the willful, felonious and burglarious intent to steal said property, or to commit any, felony.
- A Special Court Martial (SPCM) convened on 26 June 1981. He was found guilty of:
 - Being AWOL from 6 February 1981 until 17 March 1981
 - Wrongfully and without authority wear upon his uniform the insignia of grade of a sergeant of the United States Army on or about 26 March 1981
 - Resist being lawfully apprehended by Sergeant First Class W.W.P. on or about 26 March 1981
 - Failed to go at the time prescribed to his appointed place of duty (morning formation) on or about 6 May 1981
 - He was sentenced to confinement at hard labor for four months and to have the sum of \$100 per month for three months detained for three months, and the be reprimanded
 - On 14 July 1981, the applicant presented with his attorney, advised of the charge and punishment, advised of his right to jury trial (waived), advised of his right to confront the witness and to remain silent. He voluntarily entered a plea of guilty. The state accepted his plea. He was advised of his rights to pre-sentence investigation.

- On 1 September 1981, his immediate commander initiated separation action to discharge him prior to his expiration term of service for misconduct. The specific reason for separation was his civil conviction. He received a three-year sentence in the state penitentiary. One year of which will be served with the remaining two being deferred.
- On 14 October 1981, the applicant was discharged under the provisions of AR 635-200, chapter 14 with an under other than honorable conditions characterization of service. His DD Form 214 shows separation code JKB, narrative reason for separation - Misconduct - Conviction by Civil Court, and reenlistment code RE-3B.
- On 24 March 1997, the Army Discharge Review Board (ADRB) after careful consideration of his military records and all other available evidence, determined that he was properly and equitably discharged. Accordingly, his request for a change in the character and/or reason of his discharge was denied.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant states "he was a young and dumb kid and did not know better. He is not educated and cannot explain his situation or problem in words. He would be very grateful". Due to the period of service no active-duty electronic medical records were available for review, thus, there was insufficient evidence the applicant was diagnosed with a psychiatric condition during military service.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. No VA electronic medical records were available for review, the applicant is not service connected, and he did not submit any medical documentation post-military service substantiating his assertion of OMH. In addition, on 5 June 2023, the Case Management Division of ARBA informed the applicant he must provide medical documentation in support of his contention of PTSD and OMH; no response was received.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant selected PTSD and OMH on his application. However, he does not state a rationale for his notation of PTSD on his applicant, nor does he specify any behavioral health condition/diagnosis.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service or after his discharge.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for any mental health condition. And while the applicant selected PTSD and OMH on his application, he did not provide any medical documentation substantiating his assertion. Regardless of diagnosis, it is unlikely any BH condition would mitigate the applicant's misconduct since breaking and entering is not part of the history or natural sequelae of any BH condition.

g. Per Liberal Consideration guidelines, his contention of PTSD and OMH is sufficient to warrant consideration by the Board.

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 consideration for requesting upgrade of discharge characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence of any mitigating BH condition. The opine found no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition. The Board carefully considered the applicant's contentions of PTSD and OMH under liberal consideration, however the applicant's undocumented mental health conditions did not outweigh his egregious misconduct

2. The Board determined there is insufficient evidence of mitigating factors to overcome the misconduct of a civilian conviction for burglary in the second degree and AWOL. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board determined the applicant's service record exhibits numerous instances of misconduct during his second enlistment period for 6 months and 12 days net active service this period. Furthermore, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board denied relief.

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:

<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.

[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, 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 (AR) 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. AR 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for 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.

4. 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.

5. Title 10, USC, Section 1201 provides for the physical disability retirement of a member who has either 20 years of service or a disability rating of 30% or greater.

6. Title 10, USC, Section 1203 provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30%.

7. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

a. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career.

b. The VA does not have authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform her duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. 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.

9. 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; 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 on 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.

10. 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.

//NOTHING FOLLOWS//