

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 November 2023

DOCKET NUMBER: AR20230004066

APPLICANT REQUESTS:

- Reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge to an honorable discharge
- the narrative reason for his separation be changed to medical retirement, and financial compensation
- additionally, he requests a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement
- Document barring him from reentering Fort Sam Houston, TX
- One page extracted from his DD Form 458 (Charge Sheet)
- Letters of Support (8)
- Article entitled "Policy Guidance for Discharge Review Boards and Boards for Correction"
- Article entitled "The Blue Ticket Discharge: A Color that has Stained the Lives of WWII-Era Veterans for Over 75 Years"
- Article entitled "Fort Hood: A Toxic Culture"
- Title 38, Code of Federal Regulations (CFR), Section 3.12
- Department of Veterans Affairs (VA) Form 21-0781 (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD))

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20220001674 on 18 August 2022.

2. The applicant states he has concrete evidence in his files that his superiors could have and should have looked deeper into the unusual charges against him and came to a fair judgement and assessment of a young 19-year-old man. Prior to joining the Army, he had no criminal record or drug record. He had a decent school record.

a. He was recognized for completing Basic Combat Training (BCT) with high scores. He made it most of the way through Advanced Individual Training without incidents of wrongdoing until he started having problems performing to standard due to pain in his feet, ankles, and legs that never stopped. Military doctors diagnosed his condition and determined he should be given special shoes, a different military occupational specialty, and be processed for a medical separation when he reached his next duty station.

b. Instead, he started receiving punishment for mysterious charges such as not getting a haircut, wearing his hat incorrectly, using profanity that was directed at him since entering the Army, and threatening a noncommissioned officer (NCO) who was smoking marijuana. Even though he was still in pain, he was punished with extra duty after work, shackled, and sent to prison for an unknown reason with no idea of how long he would be there. While incarcerated, he had a fear of dying because another prisoner died two cells down from him.

c. His separation had more to do with denying him disability benefits than misconduct. He was unfairly targeted by military police (MP) who made false accusations against him because he is black and was dating a white female Soldier who became pregnant. The MP report says they stopped him and saw a lit marijuana cigarette and a bag of marijuana on the seat, and that he readily admitted the marijuana was his, this was untrue. He never smoked marijuana on post because he considered it honored ground, and he is willing to take a lie detector test as proof. He also states spying is illegal on post against a Soldier unless they are under investigation.

d. His company commander's recommendation for him to receive an "undesirable" characterization of service violated his civil rights because in 1945 that meant the Soldier was a homosexual or had committed homosexual acts. He is seeking compensation for psychological effects of the injustices, the shame associated with his discharge, and the fact that he suffers from hypertension, back aches, feet pain, hearing loss, sleeplessness, PTSD, claustrophobia, and hyper vigilance.

3. On 23 June 1978, the applicant enlisted in the Regular Army in the rank/grade of private/E-2 for a period of 3 years.

4. His platoon sergeant gave him a letter of congratulations for his outstanding performance of duty as a Trainee Leader during BCT from 20 June 1978 to 15 August 1978. He was advanced to private first class (PFC)/E-3 on 23 June 1979.

5. On 13 August 1979, the applicant received company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), for willfully disobeying a lawful order from a superior NCO on or about 1 August 1979. His punishment consisted of reduction from E-3 to E-2; forfeiture of \$100.00 pay, and

seven days confinement in the correctional confinement facility (CCF) (suspended for 90 days).

6. On 14 December 1979, the applicant received field grade NJP under the provisions of Article 15 of the UCMJ, for willfully disobeying a lawful order from an NCO and being disrespectful toward an NCO. His punishment consisted of reduction to private/E-1 (PV1); forfeiture of \$200.00 pay per month for two months; and 30 days confinement in the CCF. The applicant appealed the punishment, and his appeal was denied.

7. On 19 December 1979, the applicant's company commander requested that a bar to reenlistment be imposed upon the applicant based on his NJPs, always missing work, and not meeting personal appearance standards. Immediately after receiving his most recent NJP, he threatened an NCO and was pending a filed grade Article 15. The bar was approved on 20 December 1979.

8. On 21 December 1979, the applicant received field grade NJP under the provisions of Article 15, of the UCMJ, for communicating a threat towards an NCO on or about 14 December 1979. His punishment consisted of forfeiture of \$200.00 pay per month for two months.

9. On 7 February 1980, the applicant was arraigned and tried by a summary court-martial. The applicant was found guilty of three specifications of disobeying lawful orders from superior NCOs. His sentence consisted of forfeiture of \$299.00 pay and confinement at hard labor for 30 days. The sentence was adjudged, approved, and ordered executed on 7 February 1980.

10. MP Reports show the applicant was the subject of an investigation for wrongful possession of a controlled substance (marijuana). In pertinent part:

a. On 22 September 1980, the applicant was one of three males rolling what appeared to be marijuana cigarettes. When MP officers approached the applicant's vehicle a slight odor of suspected marijuana was detected emitting from the passenger side window and a partially burnt hand rolled cigarette suspected to be marijuana was observed inside the passenger side door ashtray. The applicant was placed under apprehension and a further search of his vehicle revealed one clear plastic bag containing suspected marijuana was found in a portable console in the middle of the front floor and five plastic bags containing suspected marijuana was found under the driver's seat in a brown paper bag.

b. The applicant was transported to the MP station, advised of his legal rights, rendered a sworn statement; wherein, he admitted to possessing and smoking marijuana inside his vehicle on post. He was later released to his unit.

11. On 6 November 1980, court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) shows he was charged with:

- One specification of wrongful possession of marijuana
- One specification of wrongful possession of one hand-rolled cigarette of marijuana
- One specification of wrongful use of marijuana.

12. On 17 November 1980, the applicant consulted with legal counsel. He was informed of the charges against him for violating the UCMJ and that he was pending trial by court-martial. He was advised of the rights available to him and of the option to request discharge for the good of the service in lieu of trial by court-martial.

a. He voluntarily requested discharge under the provisions of Chapter 10, Army Regulation (Personnel Separations – Enlisted Personnel), for the good of the service in lieu of trial by court-martial. By submitting his request for discharge, he acknowledged that he was guilty of the charges against him or of a lesser included offense therein contained, which also authorized the imposition of a bad conduct or dishonorable discharge. The applicant's request for discharge states he was not subjected to coercion with respect to his request for discharge.

b. He was advised that he might be:

- deprived of many or all Army benefits
- ineligible for many or all benefits administered by the Veterans Administration
- deprived of his rights and benefits as a veteran under both Federal and State laws; and he may expect to encounter substantial prejudice in civilian life because of an under other than honorable discharge

c. He acknowledged he understood that, if his request for discharge was accepted, he might be discharged UOTHC. He was also advised that he could submit statements in his own behalf. The available record is void of a statement in his own behalf.

13. On 20 November 1980, the applicant underwent a pre-separation medical examination and was medically cleared for separation action.

14. His chain of command recommended approval of his request for discharge with the issuance of an UOTHC discharge.

15. On 25 November 1980, the separation authority approved the applicant's request for discharge and directed that his service be characterized as UOTHC.

16. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged on 12 December 1980, for the good of the service in lieu of trial by court-martial, under the provisions of Army Regulation 635-200, Chapter 10. His service was characterized as UOTHC. His Separation Code was "JFS" and his Reenlistment Code was "RE-3 and 3B." He was credited with 2 years, 4 months, and 28 days of net active service, with lost time from 7 February to 28 February 1980.

17. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

18. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 30 March 1982, the applicant was informed that after careful consideration, the ADRB had determined he was properly and equitably discharged and denied his request.

19. On 2 February 2023, the Board considered his petition for an upgrade of his discharge and denied it. The Board stated after reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. Based upon the pattern of misconduct leading to the applicant's separation, the findings and recommendations of the medical advisor, as well as the lack of mitigation for any of the misconduct in the record, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's characterization of service.

20. In addition to the previously discussed evidence, the applicant provides the following documents in support of his petition:

a. Eight letters of support, wherein family members, friends, and co-workers rendered very favorable comments regarding the applicant's character, work ethic, and devotion to his family and church.

b. An article titled "Policy Guidance for Discharge Review Boards and Boards for Correction," wherein the author explains various policies that were implemented by the Department of Defense and Army for determining the possible impact of behavioral health conditions on a servicemembers misconduct with an emphasis on clemency when making determinations on service characterizations.

c. An article titled "The Blue Ticket Discharge: A Color that has Stained the Lives of WWII-Era Veterans for Over 75 Years." The "Blue Discharge" was used exclusively during the WWI and WWII eras and was not in effect during the applicant's period of service.

d. An article titled "Fort Hood: A Toxic Culture" wherein the author describes the toxic command climate that existed at Fort Hood, TX during the mid to late 2000s, long after the applicant's discharge.

e. Title 38, CFR, Section 3.12, Character of Discharge, pertaining to the criteria for determining service characterization and eligibility for VA benefits.

f. VA Form 21-0781, which shows the applicant filed a claim for service connected PTSD.

21. By regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous requests for an upgrade of his under other than honorable conditions (UOTHC) discharge, the narrative reason for his separation be changed to medical retirement, and financial compensation. He is contending in this request that he experienced harassment and resultant PTSD, which 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: 1) The applicant enlisted in the Regular Army on 23 June 1978; 2) On 13 August 1979 and on 14 December 1979, the applicant received nonjudicial punishments (NJP) for willfully disobeying an NCO; 3) On 19 December 1979, the applicant's company commander requested that a bar to reenlistment be imposed upon the applicant based on his NJPs, always missing work, and not meeting personal appearance standards. Immediately after receiving his most recent NJP, he threatened an NCO and was pending an Article 15. The bar was approved on 20 December 1979; 4) On 6 November 1980, court-martial charges were preferred against the applicant for wrongful possession of marijuana, wrongful possession of one hand-rolled cigarette of marijuana, and wrongful use of marijuana; 5) The applicant was discharged on 12 December 1980, Chapter 10, for the good of the service in lieu of trial by court-martial. His service was characterized as UOTHC; 6) On 30 March 1982 and 2 February 2023, the Army Discharge Review Board (ADRB) reviewed and denied the applicant's requests for an upgrade of his discharge.

c. The 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 the applicant's previous application were also examined.

d. The applicant did not submit new medical documentation in his new application. In this application, he noted in his application experiencing PTSD and sexual

assault/harassment. The applicant never described experiencing military sexual trauma (MST) in his application, and there is insufficient evidence he reported MST while on active service. He more specifically reported feeling harassed unnecessarily and for dating a female Soldier of a different ethnicity. The applicant underwent a pre-separation medical examination and was medically cleared for separation on 20 November 1980. There is insufficient evidence that he reported any mental health symptoms while in active service. A review of JLV did not demonstrate any evidence of the applicant being diagnosed with any service-connected mental health condition including PTSD, and the applicant did not provide any additional civilian medical documentation.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct. In addition, there is insufficient evidence the applicant was experiencing a mental health condition at the time of his active service which warrants a referral IDES.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reported in his application experiencing harassment, and he reported experiencing PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reported in his application experiencing harassment during his active service and resultant symptoms of PTSD, which mitigate his misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant experienced harassment or PTSD during his military service. The applicant's misconduct of disrespect toward NCOs, missing work, not meeting personal appearance standards, and drug possession and use can be associated with PTSD. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition or the experience of harassment. In addition, there is insufficient evidence the applicant was ever found to not meet retention standards as the result of a mental health condition and, a referral to IDES is also not recommended. However, the applicant contends he was experiencing a mental health condition and harassment that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The Board determined 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.

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, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges voluntary requests for discharge in lieu of trial by court-martial and carry and under other than honorable conditions discharge. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provides letters of support, wherein family members, friends, and co-workers provided very favorable comments regarding his character, work ethic, and devotion to his family and church. Based on his post service staining in his community, the Board determined although these letters do not outweigh the misconduct he committed. 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.

b. Regarding the reason for separation, the Board noted that the applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 10 of AR 635-200 due to his wrongful possession and use of illegal drugs, which led to the initiation of court-martial charges. Absent his illegal drugs and subsequent court-martial charges, there would have been no reason for him to request a voluntary request for discharge in lieu of court-martial. The underlying reason for his separation is his voluntary request for discharge. The only valid narrative reason for his separation is "In lieu of trial by court-martial."

c. Regarding medical separation, the Board agreed with the medical reviewer's finding no evidence to support the applicant had condition or experience that mitigates his misconduct. In addition, there is insufficient evidence the applicant was experiencing a mental health condition at the time of his active service which warrants a referral to the disability evaluation system (DES). There is no evidence the applicant had any medical condition prior to his discharge which would have failed the medical retention



standards of chapter 3, AR 40-501, and would therefore have been a cause for referral to the DES. Therefore, the Board determined there is no merit to his request for a medical separation.

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.



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 (USC), 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 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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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 post-traumatic stress disorder; 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 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 misconduct that led to the discharge.

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.

//NOTHING FOLLOWS//