

IN THE CASE OF: ██████████

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230005693

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general) or honorable.

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

DD Form 293 (Application for the Review of Discharge)

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 that change is requested because he is disabled, and he needs medical benefits.
3. On his DD Form 293, the applicant notes that post-traumatic stress disorder (PTSD) is related to his request.
4. The applicant enlisted in the Regular Army on 20 October 1975, for 3 years. His record shows he was not awarded a military occupational specialty.
5. The applicant was convicted of auto theft by the ██████████ County Circuit Court, ██████████, on 3 June 1976. He was sentenced to 2 years imprisonment in the custody of the Department of Corrections of the State ██████████.
6. The applicant was notified that he was being recommended for elimination from the service under the provisions of Army Regulation 635-206 (Personnel Separations – Discharge – Misconduct (Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion)), by reason of his civil court conviction. However, the notification of the proposed action to discharge the applicant is not part of the available record.

7. On 5 August 1976, the applicant consulted with counsel and acknowledged that he had been advised of the basis for the recommended action to separate him under the provisions of Army Regulation 635-206, for civil conviction. He waived his right to consult with counsel, and declined to submit a written statement in his own behalf.

8. On 27 August 1976, the applicant's commander formally recommended his separation from service under the provisions of Army Regulation 635-206, for civil conviction. As the specific reason, the commander noted the applicant's substandard performance before his civil conviction.

9. Consistent with the chain of command's recommendation, the separation authority approved the recommended discharge on 17 September 1976, and directed he be furnished an undesirable discharge.

10. The applicant was discharged on 23 September 1976. His DD Form 214 (Report of Separation from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-206, with Separation Program Designator JKB (Civilian Conviction) and Reentry Codes 3 and 3B. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 2 months and 29 days of net active service this period.

11. On 16 June 2023, the ABCMR staff requested that the applicant provide medical documents to support his issue of PTSD. He was advised that he could contact the doctor that diagnosed him or the Veterans Affairs regional office for assistance. He did not respond.

12. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

13. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Under Other Than Honorable Conditions discharge be upgraded to an Under Honorable Conditions (General) discharge due to PTSD. He also has indicated this is needed due to a medical disability.

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 20 Oct 1975

- On or about 03 Jun 1976, applicant was arrested for theft of an automobile and convicted by the Circuit Court of ██████████, ██████████. He was subsequently sentenced to two years in the Missouri State Penitentiary
- On 27 Aug 1976, it was recommended by the Commander, Company E, 5th BN (CS), 4th AIT Brigade (ENGR) USATC Engineer, Fort Leonard Wood, "that EM be discharged due to his substandard performance before his civil conviction. PVT 1 Myers had an approved Trainee Discharge prior to his imprisonment. Recommend PVT 1 Myers receive an Undesirable Discharge."
- The applicant's separation packet was available for review. The applicant's service record included his DD Form 214 (Report of Separation from Active Duty), which showed that the Army discharged the applicant Under Other Than Honorable Conditions on 23 Sep 1976.

c. 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), his DD Form 214, as well as documents from his service record. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant asserted that PTSD was a mitigating factor in his discharge. He also contends he has a medical disability. His service record and supporting documents did not contain any service treatment records. No other medical or behavioral health records were provided. There is an absence of any documents that indicate the applicant was ever diagnosed or treated for a potentially mitigating behavioral health condition during his time in service.

e. Per the applicant's VA EHR, he is not service connected for any medical or behavioral health conditions. There is one outpatient encounter note in JLV, dated 17 Apr 2023, that was written by a social worker. It noted, "VSO is working on plan to transport Veteran from DOC prison facility in Boley. HCRV informed that DOC typically provides Veterans with bus ticket to OKC. VSO will f/u with prison to determine transportation plan." There were no medical or behavioral health notes in the Documents, Problem List, Medications, Consults or Progress Notes sections of JLV.

f. In summary applicant is not currently service connected for any mitigating mental health conditions. After reviewing the application and all supporting documents, this Agency Medical Advisor cannot provide an opine regarding potentially mitigating conditions or experiences without documentation of the specific behavioral health conditions that contributed to his discharge. In addition, even if PTSD or other behavioral health conditions could be established, it is very doubtful theft of a vehicle could be mitigated. Theft in general is not associated with a PTSD condition.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. No, there was no available documentation in his service records and JLV to indicate the presence of PTSD or any other behavioral health conditions while in service.

(2) Did the condition exist or experience occur during military service? No, there are not any clinical records provided for this review to support the presence of any behavioral health conditions during his period of active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, since there are not any behavioral health conditions that can be established during applicant's time in service. However, as per liberal consideration, applicant's self-assertion of PTSD alone merits consideration by the board.

BOARD DISCUSSION:

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, applicable regulatory guidance and published DoD guidance for liberal consideration of discharge upgrade requests. The Board found no clear or convincing evidence and, in the absence of any mitigating factors such as post-service accomplishments or letters of reference to weigh in favor of the request, the Board found 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 Board determined the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of his case are insufficient as a basis for correction of the records of the individual concerned and an upgrade of his under other than honorable conditions (UOTHC) discharge is not warranted.

2/28/2024

X

CHAIRPERSON

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 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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

4. Army Regulation 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct. Section VI, paragraph 33 (Conviction by Civil Court) of this regulation prescribes the standards and procedures for processing cases of individuals who, during their current term of active military service, have been initially convicted or adjudged juvenile offenders by a domestic court of the United States or its territorial possessions, or convicted by a foreign tribunal. If discharge is desired and the individual is not physically in the custody of the civil authorities, a recommendation for discharge may be submitted to Headquarters, Department of the Army. It provided that an undesirable discharge was normally considered appropriate for members separated under this regulation.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service (BCM/NR), on 3 September 2014, 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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

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, 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//