

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 12 January 2024

DOCKET NUMBER: AR20230005718

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to general.

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

- DD Form 149 (Application for Correction of Military Record)
- Three (3) character statements

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, in effect, he believes he was given the under other than honorable conditions discharge because he did not want to jump from an airplane, so they were trying to send him to Germany. He had become fearful of flying and dying jumping [sic] after he seen a static line cut and the Soldier died. An upgrade will make him eligible for benefits because of the post-traumatic stress disorder (PTSD) he suffers from.
3. The applicant provided three (3) character statements from his best friend, his older brother, and his first cousin, all of whom attest to a change in his behavior and lack of interest in playing basketball once he was separated from the Army. His cousin also mentions the applicant's dependency on drugs and alcohol to help him get through his nightmares.
4. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 7 November 1978 for four years as an 11B, Infantryman.
 - b.

c. On 11 March 1981, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, for receiving three Article 15s and one court-martial, which is grounds for elimination action for reasons of misconduct. The commander also included a detailed listing of the applicant's misconduct, which include his Summary Court Martial, Article 15s, and counseling statements.

d. The applicant acknowledged receipt of the commander's intent to separate him. He was advised of the basis for the contemplated separation action for misconduct, the type of discharge he could receive and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights available to him. On 26 March 1983, he requested consideration of his case by a board of officers.

e. On 11 March 1981, the applicant's commander requested that requirements for rehabilitative transfer be waived for the purpose of elimination under the provisions of chapter 14, AR 635-200. Further citing the applicant's conduct and performance had been substandard, he had not shown no rehabilitative potential whatsoever, he will not perform as is required without constant full-time supervisions, and that attempts at rehabilitation would prove futile. The applicant's battalion commander recommended approval and the request for waiver was ultimately approved by the brigade commander.

f. It is unclear the exact date as to when the applicant was notified to appear before a Board of Officers on 27 April 1981 to determine whether he should be discharged prior to his normal expiration of his term of service under the provisions of paragraph 14-33b, AR 635-200, for reasons of misconduct. According to the Administrative Discharge Board Summary of Proceedings a verbatim record of the findings and recommendations of the board was attached; however, the applicant's service record was void of said findings and recommendations.

g. On 21 May 1981, the separation authority approved the request for waiver of rehabilitative transfer, directed the discharge under the provisions of paragraph 14-33b(1), AR 635-200, and furnished an under other than honorable conditions discharge certificate.

h. His DD Form 214 reflects he was discharged on 10 June 1981 under the provisions of AR 635-200, paragraph 14-33b(1), misconduct – frequent incidents of a discreditable nature with civil or military authorities, with a character of service of under other than honorable conditions. He served 2 years, 3 months, and 28 days of net active service this period, with lost time as follows:

- 15 August 1980 – 26 August 1980

- 16 September 1980 – 30 September 1980
- 17 December 1980 – 7 January 1981
- 16 April 1981 – 10 June 1981

5. There is no evidence that the applicant applied to the Army Discharge Review Board for review of his discharge within the board's 15 year statute of limitations.

6. AR 635-200 (Personnel Separations – Enlisted Personnel) states, action will be taken to separate a member for misconduct. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter.

7. The Board should consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to general. He selected PTSD on his application as related to his request.

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 RA on 7 November 1978.

On 9 November 1979 he accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for dereliction of duty by leaving his weapon in room on 11 October 1979.

On 9 June 1980, he accepted NJP under Article 15 of the UCMJ, for possession of marijuana on 6 May 1980.

On 7 August 1980, he accepted NJP under Article 15 of the UCMJ, for possession of marijuana on 2 July 1980.

On 19 December 1980, per Summary of Court Martial, applicant was sentenced to the following charges:

Charge I, Article #86, Specification I: AWOL from 15 August 80 to 26 August 80.

Specification II: AWOL from 16 September 1980 to 1 October 1980.

Charge II, Article #1077 Specification I: Presentation of a fraudulent DA Form 31, Request and Authorization for Leave, on 26 August 1980.

Charge III, Article #123, Specification I: Fraudulently signing, a DA Form 31; Captain John C. Dilbert's signature on 15 August 1980.

c. Applicant received Counseling Statements on the following dates/for:

- 24 April 1979 - Failing to Repair on 23 April 1979.

- 9 August 1979 - During a TA-50 inspection there was ammunition found in the pouch of SM.
- 15 August 1979 - SM wrote a check for \$10 dollars and did not have sufficient funds in the bank on 23 July 1979.
- 28 August 1979 - SM was counseled on the seriousness and responsibility of writing checks.
- 4 March 1980 - This is a Statement that SM missed a formation at 1315 hours.
- 6 March 1980 - This is a Statement that SM was late for a formation at 0915 hours.
- 10 March 1980 - SM was sent a Notification of a Dishonored Check for \$6.10 dollars, dated 22 FEB 80.
- 6 August 1980 - This is a Statement that SM was called several times before a formation but remained wrapped up in a blanket and failed to fall out at 0700 hours. At 0910 hours SSM still had failed to get up.
- 25 November 1980 -These two Statements say that SM told [REDACTED] he had an appointment with the Sergeant Major and the Sergeant Major wasn't aware of the appointment. SM was to secure his weapon later that day from the training area but was found watching T.V. in his room.
- 22 January 1981 -This Alcohol/Drug Prevention and Control (ADAPCP) Referral form indicates an Unsatisfactory Duty Performance and recommends SM enter the Urine Surveillance Program.
- 11 March 1981, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, for receiving three Article 15s and one court-martial.
- Applicant was discharged on 10 June 1981. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-33b, misconduct - frequent involvement in incidents of a discreditable nature with civil or military authorities. His service was characterized as UOTHC.

d. 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), three (3) character statements, and documents from his service record and separation packet. 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.

e. The applicant states, he believes he was given an under other than honorable conditions discharge because he did not want to jump from an airplane, so they were trying to send him to Germany. He had become fearful of flying and dying jumping after he had seen a static line cut and the Soldier died. The applicant states an upgrade will make him eligible for benefits so that he can receive treatment of the post-traumatic stress disorder (PTSD) he suffers from. The applicant provided three (3) character statements from his best friend, his older brother, and his first cousin, all of whom attest to a change in his behavior and lack of interest in an activity he previously enjoyed, once he was separated from the Army. His cousin also mentions the applicant's dependency on drugs and alcohol to cope with nightmares.

f. No active-duty electronic medical records were available for review. Applicant is not service connected, possibly due to the characterization of his discharge, and limited VA electronic records were available for review. His VA record indicates the applicant initiated mental health services with the VA on 22 February 2023, when he was referred for completion of a Comprehensive Suicide Risk Evaluation, after a positive screening during a nursing intake. The applicant stated he was interested in transferring his mental health care from a civilian provider to the VA and, per the results of the assessment, he was referred to the Trauma Recovery Program. He was diagnosed with Reaction to Severe Stress, Depression, and Chronic PTSD per history. The applicant participated in a comprehensive intake for the Trauma Recovery Program on 10 March 2023. He reported a history of military trauma, indicating while serving in the 82nd airborne, he witnessed a fellow service member die during a jump from an airplane. He reported witnessing the immediate aftermath of this accident and saw the service member's body on the ground. The applicant identified this as the index trauma. In addition to the index trauma, he reported an incident that occurred while incarcerated in a county jail during his military service in which he was attacked by two inmates. He reported loss teeth and sustained an injury to his nose during the attack. The veteran also reported adverse experiences in childhood, making him more susceptible to PTSD. He indicated his father died when he was 12 years old, and his mother died in a motor vehicle accident when he was 14 years old. The applicant started Prolonged Exposure therapy for PTSD on 28 March 2023 and participated through 12 July 2023; he completed all 12 sessions. Applicant was then referred for ongoing psychotherapy and medication management to address his symptoms of depression and PTSD. Group therapy was also recommended, and the applicant continues to receive mental health services via the VA.

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

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 a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant selected PTSD as related to his request. He reported witnessing a fellow service member die during a jump from an airplane and seeing the service member's body on the ground.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. There is evidence of a potentially mitigating BH condition while in military service. The applicant initiated BH services with the VA in February 2023 and continues to receive services to address symptoms of PTSD and depression. Given the nexus between PTSD/Depression and avoidance as well as the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the applicant's dereliction of his duties, AWOL, and possession of marijuana are mitigated by his BH condition. However, his presentation of a fraudulent a DA Form and fraudulently signing a DA Form with the intent to deceive are not mitigated by his BH condition, since PTSD does not impact one's ability to distinguish right from wrong and act in accordance with the right.

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 Board carefully considered the applicant's military record, and regulatory guidance. The Board considered the frequency and nature of the misconduct, reason for separation and whether to apply clemency. The Board found sufficient evidence of mitigating factors for a portion of the misconduct. However, actions such as presenting fraudulent documentation reflects willful intent to deceive is neither a mitigating factor toward the misconduct nor his ability to make correct decisions and appropriate action. In the absence of post service accomplishments or letters of reference to weigh in consideration of his 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 this case are insufficient as a basis for correction of the records of the individual concerned and an upgrade to his character of service is not warranted.

█

█ █

█

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 three years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a states 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 states 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.

c. Chapter 14, of the version in effect at the time, established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, and convictions by civil authorities. It provided that action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally appropriate for a Soldier discharged under this chapter. However, the separation authority could direct an honorable discharge if merited by the Soldier's overall record.

3. 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.

4. 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; TBI; 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 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 that misconduct which led to the discharge.

5. 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.

6. Section 1556 of Title 10, United States Code, 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.

//NOTHING FOLLOWS//