

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 December 2023

DOCKET NUMBER: AR20230005961

APPLICANT REQUESTS: reconsideration of his previous requests for an upgrade of his under other than honorable conditions (UOTHC) characterization of service.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)
- Standard Form 180 (Request Pertaining to Military Records)

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 Numbers AR20130011800 on 4 March 2014 and AR20150001255 on 10 March 2015.

2. The applicant states, during his time in the military he suffered from post-traumatic stress disorder (PTSD), but it was not known back then. He saw people get shot and during the same period his mother was sick and had both her legs amputated. He requested 15-days of leave to see his mother but was denied by Captain S_. He was only 22-Years old; he was harassed by another person in his unit, he was angry, unhappy, and snapped during an argument. He regrets what he did, which was a long time ago under difficult circumstances. Additionally, his application to the Board notes his request is related to PTSD.

3. The applicant's original record is not available for review; however, his previous case contains his separation packet containing the specific facts and circumstances surrounding his discharge processing.

4. He enlisted in the Regular Army on 14 December 1972. He served in Germany from 26 June 1973 through 19 June 1974.

5. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on two separate occasions, for the following misconduct:

a. 29 August 1973 – The applicant did, at or near at or near Warner Barracks, Bamberg, Germany, on or about 17 August 1973, assault and wrongfully communicating a threat to injure a Soldier and wrongfully using provoking words.

b. 13 November 1973 – The applicant did, at or near Warner Barracks, Bamberg, Germany, on or about 2 November 1973 drive without his hat, with only one private first class insignia on his collar and had his field jacket unbuttoned. He also, on or about 7 November 1973, having received a lawful order from a superior commissioned officer, did willfully disobey the same and was derelict on the performance of his duties. His punishment included reduction to the grade of Private/E-2, forfeiture of \$80.00 for one month and correctional custody for a period of seven days.

6. On 8 February 1974, before a special court-martial at Bamberg and Fuerth, Germany, Special Court-Martial Orders Number 73 found the applicant was guilty of one specification of violating the UCMJ, Article 128 (Assault) by stabbing a Soldier in the left front side with a knife, lacerating the Soldier's diaphragm and perforating his spleen on or about 3 December 1973. His sentence included a bad conduct discharge, six months confinement at hard labor, forfeiture of \$217.00 pay for six months, and reduction to the lowest enlisted grade. On 18 May 1974, the sentence was approved and ordered duly executed. The record of trial was forwarded for appellate review.

7. The Army Court of Military Review approved the findings of guilty and affirmed the sentence on 11 July 1975.

8. On 26 September 1975, Special Court-Martial Orders Number 57, issued by the U.S. Army Signal Center and Fort Gordon, Fort Gordon, GA noted the sentence having been complied with, would be duly executed. No confinement remained to be served.

9. A Standard Form 93 and Standard Form 88 dated 26 June 1974 show the applicant was medically cleared for separation.

10. On 24 October 1975, the applicant was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11. His DD Form 214 shows his service was characterized as UOTHC, he was credited with completing 2 years, 5 months, and 26 days of net active service and 135 days of lost time. Additionally, his Separation Code was "JJD," and his reentry code was "3 and 3B."

11. The Army Discharge Review Board (ADRB) reviewed the applicant's petition for an upgrade of his discharge on 1 May 1981; after careful consideration, the Board

determined that he was properly and equitable discharged. Accordingly, his request for relief was denied

12. The applicant petitioned the ABCMR for an upgrade to his service characterization on two previous occasions. The ABCMR considered his request on 4 March 2014 and 10 March 2015, determined the evidence presented did not demonstrate the existence of a probable error or injustice, he was properly discharged, and denied his request for relief.

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

14. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous requests for an upgrade of his under other than honorable conditions (UOTHC) characterization of service. The applicant asserts that PTSD is a mitigating factor in his discharge.

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:

- He enlisted in the Regular Army on 14 December 1972.
- The applicant accepted non-judicial punishment (NJP) on two separate occasions, for the following misconduct:
- On 29 August 1973 – The applicant did, at or near at or near Warner Barracks, Bamberg, Germany, on or about 17 August 1973, assault and wrongfully communicating a threat to injure a Soldier and wrongfully using provoking words.
- On 13 November 1973 – The applicant did, at or near Warner Barracks, Bamberg, Germany, on or about 2 November 1973 drive without his hat, with only one private first class insignia on his collar and had his field jacket unbuttoned. He also, on or about 7 November 1973, having received a lawful order from a superior commissioned officer, did willfully disobey the same and was derelict on the performance of his duties.
- On 8 February 1974, before a special court-martial at Bamberg and Fuerth, Germany, Special Court-Martial Orders Number 73 found the applicant was guilty of one specification of violating the UCMJ, Article 128 (Assault) by stabbing a Soldier in the left front side with a knife, lacerating the Soldier's diaphragm and perforating his spleen on or about 3 December 1973.
- On 24 October 1975, the applicant was discharged under AR 635-200, Chapter 11. His service was characterized as UOTHC.
- The ADRB denied his request for relief on 1 May 1981. The ABCMR denied his request for relief on 10 March 2015.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, DD Form 149, his ABCMR Record of Proceedings (ROP), his DD Form 214, and Standard Form 180 (Request Pertaining to Military Records). The applicant's original record is not available for review; however, his previous case contains his separation packet containing the specific facts and circumstances surrounding his discharge processing. 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.

d. The applicant asserts that he was suffering from PTSD, "but there was no such thing back then." He noted stressors as having seen people shot and his mother having to lose both of her legs, and his unit not letting him take leave to see his mom. He noted he was angry and unhappy at the time and was being harassed by someone in the unit and "kind of snapped during an argument." He reported regretting what happened but that it was a long time ago under difficult circumstances.

e. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents were not made available and his previous board file does not contain his service treatment records (STR). However, his record reflects a Standard Form 93 and Standard Form 88 dated 26 June 1974 that show the applicant was medically cleared for separation. There was no evidence provided to substantiate his assertion of PTSD.

f. Per the applicant's VA EHR, he is not service connected. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. That said, the applicant has had some engagement with the VA and behavioral health 2011-2015. He has been diagnosed with adjustment disorder – unspecified, homelessness, and legal problems. He has primarily engaged in two programs, Health Care for Reentry (assisting the applicant with support as he transitioned out of incarceration), and Health Care for Homeless Veterans. Through review of Joint Legacy Viewing, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health records.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a potentially mitigating condition during his time in service. Regardless, there is no nexus between his charges and PTSD nor family stressors (his mother's health concerns).

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, applicant asserts PTSD as a mitigating factor.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts PTSD was present during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts PTSD as a mitigating factor, secondary to seeing people shot. However, there is insufficient evidence the applicant has ever been diagnosed with a mental health condition, to include PTSD, while in the service nor since his discharge. There is also insufficient evidence, outside of self-report, of the trauma and other stressors described. In addition, there is no nexus between assault/stabbing another soldier and PTSD. This is not part of the natural history and sequelae of PTSD. Also, PTSD does not impact the applicant's ability to know the difference between right and wrong and act in accordance with the right. Hence, mitigation due to PTSD is not supported.

BOARD DISCUSSION:

After reviewing the application, supporting documents, and evidence found within the military record, the Board found 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 requests. The Board considered the frequency and nature of the misconduct, the reason for separation and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. The Board found no clear or convincing evidence of an error or injustice and concluded the applicant was properly and equitably discharged in accordance with regulatory guidance. As the applicant has the burden of proving an error or injustice by a preponderance of the evidence, after due consideration, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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 to amend the decision of the ABCMR set forth in Docket Number AR20150001255 on 10 March 2015.

█

█ █

█

█

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 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.

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

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.

c. Chapter 11, of the version in effect at the time provided that an enlisted person would be given a bad conduct discharge (BCD) pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed. The service of Soldiers sentenced to a BCD was to be characterized as under conditions other than honorable.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, 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.

4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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. 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.

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, 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.

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.

5. 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//