

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 23 January 2024

DOCKET NUMBER: AR20230005972

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded to honorable and restoration of his rank/grade to sergeant/E-5.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- Department of Veterans Affairs (VA) Letter
- DD Form 214 (Report of Separation from Active Duty)
- Honorable Discharge Certificate

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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:

a. He suffered a grave injustice because of speaking out against blatant racism. It cost him a career in the Army that he reenlisted for. He received an honorable discharge from the Army for his service from 11 June 1973 to 10 June 1976. He reenlisted on 11 June 1976 to 18 July 1977. An unfortunate incident happened. There was lots of racism in the unit he worked in, and he requested a transfer to another mess hall in the air defense unit. He was told he had to get his transfer signed. When he went to the sergeant major for the signature, with very little conversation, he tore up the orders and told him to leave and go back to work. He was devastated as a 20-year-old naive young man who prided himself with getting along with everyone. However, speaking up once about blatant racism by the mess sergeant AK__ created a huge obstacle for him and he didn't know what to do or how to proceed.

b. Racism was prevalent, and many black men were being killed physically or professionally. He was terrified of what could happen to him and his family would never

know what happened. This instilled more fear than he can put into words. His plans were to make the Army a career that he could retire from. His highest rank was sergeant (SGT). He felt targeted for failure.

c. The VA rating decision shows service treatment records for the period 11 June 1973 to 10 June 1976 were used for the determination; however, the letter dated 1 May 2023 states potentially severing 50 percent (%) disability because "You do not have a character of discharge requisite for service connection" and that was not the evidence that supported the disability claim. He has many health problems, which can be seen in all of his VA medical records especially for the past 7 years. He is still struggling with many of these conditions, he is 67 years old and unable to work.

3. The applicant enlisted in the Regular Army on 11 June 1973 for 3 years. His military occupational specialty was 94B (Food Service Specialist).

4. He was honorably discharged on 22 March 1976, for immediate reenlistment. He was issued a DD Form 214 (Report of Separation from Active Duty) that shows he completed 2 years, 9 months, and 12 days net active service. His awards include:

- National Defense Service Medal
- Presidential Unit Citation
- two qualification badges.

5. He reenlisted in the Regular Army on 23 March 1976 for 6 years.

6. The applicant accepted non-judicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on:

- 11 September 1976, for without authority, failing to go at the time prescribed to his appointed place of duty (dining facility) on or about 6 September 1976; his punishment consisted of forfeiture of \$120.00 (suspended) and extra duty
- 19 November 1976, for without authority, failing to go at the time prescribed to his appointed place of duty on or about 11 November 1976, for disobeying a lawful order on or about 9 November 1976 (twice) and on or about 10 November 1976; his punishment consisted of reduction to specialist four/E-4 (suspended), forfeiture of \$250.00 for two months and restriction; the suspension of the punishment of reduction was vacated on 4 January 1977
- 17 May 1977, for disobeying a lawful order on or about 1 May 1977; his punishment consisted of reduction to private first class/E-3
- 8 June 1977, for failing to go at the time prescribed to his appointed place of duty on or about 29 May 1977; his punishment consisted of reduction to private 2/E-2, forfeiture of \$97.00 for one month and extra duty

- 20 June 1977, for failing to go at the time prescribed to his appointed place of duty on or about 1 June 1977; his punishment consisted of forfeiture of \$97.00 for one month

7. A Bar to Reenlistment Certificate was approved 28 December 1976.

8. The applicant's separation packet is not available for review; however, Assignment Memorandum Number TP-3427, dated 12 July 1977, issued by Headquarters, U.S. Army Air Defense Center, Fort Bliss, TX shows the applicant was assigned to the transfer point for separation processing. Effective date of separation: 18 July 1977.

9. A Statement of Medical Condition, shows there had been no change in the applicant's medical condition since his last separation examination in May 1977. The separation examination was not available for review.

10. The separation authority memorandum is not available for review; however, a Reason for Separation memorandum, dated 18 July 1977, shows the authority for separation as: Paragraph 13-5a (1), Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel) for misconduct-frequent involvement in acts of a discreditable nature with authorities.

11. The applicant was discharged on 18 July 1977, in the rank/grade of private/E-1. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 13-5a (1), based on frequent acts of a discreditable nature with civil and military authorities. He was assigned Separation Program Designator JKA with Reenlistment Code RE-3. His characterization of service was UOTHC. He completed 1 year, 3 months, and 26 days of net active service this period. His awards include the National Defense Service Medal and the Presidential Unit Citation.

12. The applicant provides:

a. A copy of his DD Form 214 as discussed above.

b. A VA Regional Office Administrative Decision, dated 1 June 1978, which shows the VA determined the applicant's discharge from military service on 18 July 1977, was issued under conditions which constitute a bar to payment of VA benefits. Although the discharge for the whole period of service which ended on 18 July 1977, has been determined to be a bar to VA benefits, he is entitled to VA benefits based on service from 11 June 1973 through 10 June 1976.

13. Regulatory guidance provides when an individual is discharged under the provisions of Army Regulation 635-200, paragraph 13-5a, by reason of misconduct, "JKA" is the appropriate separation code. Additionally, a discharge UOTHC is normally

appropriate; however, the separation authority may direct a general discharge if merited by the Soldier's overall record. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

14. 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.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting his under other than honorable conditions (UOTHC) discharge be upgraded to honorable and restoration of his rank/grade to sergeant/E-5. The applicant asserts racism is a mitigating factor in his misconduct and request for upgrade.

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 11 June 1973. He was honorably discharged on 22 March 1976, for immediate reenlistment.
- He reenlisted in the Regular Army on 23 March 1976 for 6 years.
- The applicant accepted non-judicial punishment (NJP) on:
 - 11 September 1976, for without authority, failing to go at the time prescribed to his appointed place of duty (dining facility) on or about 6 September 1976
 - 19 November 1976, for without authority, failing to go at the time prescribed to his appointed place of duty on or about 11 November 1976, for disobeying a lawful order on or about 9 November 1976 (twice) and on or about 10 November 1976
 - 17 May 1977, for disobeying a lawful order on or about 1 May 1977
 - 8 June 1977, for failing to go at the time prescribed to his appointed place of duty on or about 29 May 1977
 - 20 June 1977, for failing to go at the time prescribed to his appointed place of duty on or about 1 June 1977
- A Bar to Reenlistment Certificate was approved 28 December 1976.
- The applicant's separation packet is not available for review; however, Assignment Memorandum Number TP-3427, dated 12 July 1977, issued by Headquarters, U.S. Army Air Defense Center, Fort Bliss, TX shows the applicant was assigned to the transfer point for separation processing. Effective date of separation: 18 July 1977.
- The applicant was discharged on 18 July 1977 under AR 635-200, paragraph 13-5a (1), based on frequent acts of a discreditable nature with civil and military authorities. His characterization of service was UOTHC.

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 149, his ABCMR Record of Proceedings (ROP), his DD Form 214, some documents from his service record and separation, as well as a self-authored statement and a Department of Veterans Affairs (VA) letter. 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 he "experienced a grave injustice because of speaking out against blatant racism." He noted this cost him his career in the Army. He noted there was a lot of racism and that he felt threatened by SGT K after speaking out against the racial statement he'd said. He stated that given the prevalence of Black men being killed physically or professionally, he was terrified for his family and himself. He requested a transfer, but his request and the orders were torn up by the sergeant major. He also highlighted that he had an honorable period of service with an honorable discharge, prior to this "unfortunate incident. The applicant did not assert experiencing any mental health conditions.

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 did not contain his service treatment records (STR) However, his supporting documents and service records contained a Statement of Medical Condition, which showed there had been no change in the applicant's medical condition since his last separation examination in May 1977, though the separation examination was not available for review. No other records were provided.

f. Per the applicant's VA EHR, he is 0% service connected for medical conditions, but holds no service connection for any mental health conditions. The applicant has been engaged in care at the VA since 2016, and with mental health care since 2021. He has been diagnosed with insomnia, major depressive disorder (MDD; single episode – unspecified and recurrent – mild), and anxiety disorder - unspecified. He has engaged in primary care mental health to address stress and anxiety secondary to medical concerns and then was transferred to individual therapy where he was diagnosed with MDD. He has also engaged in medication management.

g. After reviewing the application and all supporting documents, there is insufficient evidence of a potentially mitigating condition or experience per current Liberal Consideration guidance. That said, the applicant has asserted that his experience of racism mitigates his discharge. Additionally, this Agency Behavioral Health Advisor can only provide an opine with caution, given his separation packet was not available for review.

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 racism and fear for himself and his family's safety as a mitigating factor.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced racism during his time in the service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial, though this opinion is given with caution considering his separation packet was not available for review (though the NJPs likely leading to his separation were included). The applicant asserts that he experienced a grave injustice speaking out against racism in his unit, and that because he spoke out, and how he was treated after, made him fear for himself and his family. There is no evidence of these incidents or experiences in his record, though that is understandable given the nature of the experiences and the lack of resources he would have had available to him. And while it is likely that ongoing experiences of racism and fear for one's safety, like any other trauma, would lead to avoidance behaviors (such as failure to reports [the disobeying orders seemed to be directly related to not reporting for duty]), racism is not currently considered a Liberal Consideration item. Lack of evidence notwithstanding, the board is still free to consider the issue, especially given that his misconduct is consistent with the behaviors of someone who was experiencing fear for their safety and was taking self-protective measures.

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, 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's complete separation packet is not available for review. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Other evidence shows the applicant was discharged under the provisions of AR 635-200 based on frequent acts of a discreditable nature with civil and military authorities, with an under other than honorable conditions characterization of service. 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. Additionally, the applicant does not provide evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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. The evidence of record shows the applicant received multiple NJPs that resulted in his reduction to private/E-2 on 29 May 1977. Additionally, by regulation, when a soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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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 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. 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. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. Paragraph 13-5(a), as then in effect, provided for separation for unfitness, which included frequent incidents of a discreditable nature, sexual perversion, drug abuse, shirking, failure to pay just debts, failure to support dependents and homosexual acts. When separation for unfitness was warranted, an undesirable discharge was normally considered appropriate.
 - d. When a soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade per AR 600-200, chapter 6, section IV.
4. Army Regulation 635-5 (Personnel Separations-Separation Documents) prescribed the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It established the standardized policy for the preparation of the DD Form 214. The DD Form 214 is a synopsis of the Soldier's most recent period of continuous active service. The general instructions stated all available records would be used as a basis for preparation of the DD Form 214. The

information entered thereon reflects the conditions as they existed at the time of separation. It states for: Block 6a (Grade, Rate, or Rank) 6b (Pay Grade) enter the rank.

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 Service Discharge Review Boards (DRB) and Service 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 (PTSD); 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//