

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 January 2024

DOCKET NUMBER: AR20230006220

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)
- Self-Authored Letters (three)
- Department of Veterans Affairs (DVA) Letter

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 did not carry a concealed weapon on 20 December 1971. He was never charged for that offense. He did not have an explosive device in his possession (hand grenade) on 29 September 1972; he was never charged for anything like that. He thinks this error was made on purpose to make the Army look better on its story of his time in service from 1970-1972. He was drunk and disorderly and didn't show up for duty a few times and he was busted from Sergeant/E-5 to Private/E-1. He had many black friends in the Army. He is not a racist. He is not looking to get benefits. He wants the truth about it.

b. He had a good record in the military until he took the job of being the company commander's driver and when the old commander got out of the Army, the applicant began to have problems with some of the drivers in the unit. He had a drinking problem at the time this happened. There are a lot of things on the record that did not happen. He got drunk and was disrespectful to the commanding officer on duty. He tried to fight them, they called the military police, and they took the applicant to jail. He told them he

was sorry for what happened, and he offered to tell the unit that publicly. That wasn't accepted, so he felt the best thing for him to do was to get out rather than face the charge.

3. The applicant enlisted in the Regular Army on 20 March 1969 for three years. His military occupational specialty was 63C (Track Vehicle Mechanic).
4. The applicant served in Germany from 14 January 1970 through 23 December 1972.
5. He was honorably discharged on 20 April 1970 for immediate reenlistment. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 1 year, 1 month, and 1 day of net active service.
6. The applicant reenlisted on 21 April 1970 for three years.
7. He accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on:
 - 22 December 1971 for unlawfully carrying a concealed weapon, 8mm gas pistol on or about 20 December 1971; his punishment consisted of forfeiture of \$50.00 pay for one month and extra duty
 - 5 July 1972 for without authority, absenting himself from his place of duty on or about 30 June 1972 until on or about 30 June 1972; his punishment consisted of forfeiture of \$25.00 pay for one-month, extra duty, and restriction
 - 14 July 1972 for disrespectful language toward his superior noncommissioned officer (NCO) on or about 7 July 1972 and wrongful communication of a threat to injure an NCO on or about 7 July 1972; his punishment consisted of reduction to Specialist 4/E-4, and forfeiture of \$193.00 pay for two months (suspended for one month)
 - 9 August 1972 for without authority, absenting himself from his unit on or about 8 August 1972 until on or about 8 August 1972; his punishment consisted of reduction to Private First Class/E-3 (suspended), extra duty, restriction, forfeiture of seven days' pay for one month
 - 3 October 1972 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 26 September 1972 and being in possession of a hand grenade, explosive device on or about 6 August 1971; his punishment consisted of reduction to E-3 (suspended), forfeiture of \$15.00 for one month
8. Court-martial charges were preferred against the applicant for violations of the UCMJ on 14 November 1972. His DD Form 458 (Charge Sheet) shows he was charged with:
 - behaving disrespectfully toward his superior commissioned officers (twice) on or about 13 November 1972

- striking his superior commissioned officer on or about 13 November 1972 and striking his superior NCO on or about 13 November 1972
- bring disrespectful in language toward his superior NCO on or about 13 November 1972 and wrongfully communicating a threat to his superior officers on or about 13 November 1972

9. The applicant's commanding officer recommended trial by a special court martial capable of adjudging a bad conduct discharge on 20 November 1972.

10. The applicant consulted with legal counsel on 6 December 1972 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of an undesirable discharge; the procedures and rights that were available to him.

a. After consulting with legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Separations), Paragraph 10, in lieu of trial by court-martial. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be 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 UOTHC discharge.

b. He elected not to submit statements in his own behalf.

11. The applicant's commander recommended approval and the issuance of an Undesirable Discharge Certificate on 12 December 1972. His chain of command concurred with the recommendation.

12. The Squadron Surgeon, Captain [REDACTED] Medical Corps, memorandum shows the applicant was able to distinguish between right and wrong and adhere to the right. It was doubtful that the applicant could benefit from a rehabilitative transfer and thus be of further service to the Army. He believed the applicant could understand the proceedings of board action and the applicant met retention standards.

13. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial and directed the issuance of an DD Form 258A (Undesirable Discharge Certificate) and reduction to E-1.

14. The applicant was discharged on 26 December 1972. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Paragraph 10, for the good of the service-in lieu of trial by court-martial. He was assigned Separation Program Number 246 with Reenlistment Code 4. His service was characterized as UOTHC. He

completed 2 years, 8 months, and 6 days of net active service. His awards include the National Defense Service Medal and the Expert Marksmanship Badge (M-16).

15. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Paragraph 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

16. The applicant provides a DVA letter, dated 22 February 2023, which shows an administrative decision regarding the character of the applicant's discharge for the period of service 21 April 1970 to 26 December 1972, is dishonorable for VA purposes. He does not have basic eligibility to VA benefits.

17. 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.

18. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. The applicant indicated alcohol use was related to his misconduct.

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 March 1969.
- The applicant served in Germany from 14 January 1970 through 23 December 1972.
- He was honorably discharged on 20 April 1970 for immediate reenlistment. The applicant reenlisted on 21 April 1970.
- He accepted nonjudicial punishment (NJP) on:
 - 22 December 1971 for unlawfully carrying a concealed weapon, 8mm gas pistol on or about 20 December 1971
 - 5 July 1972 for without authority, absenting himself from his place of duty on or about 30 June 1972 until on or about 30 June 1972
 - 14 July 1972 for disrespectful language toward his superior noncommissioned officer (NCO) on or about 7 July 1972 and wrongful communication of a threat to injure an NCO on or about 7 July 1972
 - 9 August 1972 for without authority, absenting himself from his unit on or about 8 August 1972 until on or about 8 August 1972

- 3 October 1972 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 26 September 1972 and being in possession of a hand grenade, explosive device on or about 6 August 1971
- Court-martial charges were preferred against the applicant for violations of the UCMJ on 14 November 1972. His DD Form 458 (Charge Sheet) shows he was charged with:
 - behaving disrespectfully toward his superior commissioned officers (twice) on or about 13 November 1972
 - striking his superior commissioned officer on or about 13 November 1972 and striking his superior NCO on or about 13 November 1972
 - being disrespectful in language toward his superior NCO on or about 13 November 1972 and wrongfully communicating a threat to his superior officers on or about 13 November 1972
 - The applicant voluntarily requested discharge, on 6 December 1972, under AR 635-200, Chapter 10, for the good of the service-in lieu of trial by court-martial. The request was approved.
 - The applicant was discharged on 26 December 1972 with an UOTHC characterization of service.

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 and DD Form 293, his ABCMR Record of Proceedings (ROP), DD Form 214, documents from his service record and separation, as well as a self-authored statement and Department of Veteran Affairs 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 several of the charges that led to his discharge, or that are in his record, are not accurate (he asserted he never carried a concealed weapon, nor did he have an explosive device). However, an opine on these assertions is outside the scope of this provider's expertise and role. Instead, this advisor will focus on the applicant's report in his self-authored statement he had a "drinking problem" at the time some of his misconduct occurred. He reported that he got drunk, was disrespectful to the commanding officer on duty, tried to fight them and the MPs were called, and he went to jail. He noted once he sobered up, he was sorry and offered a public apology but it was not accepted.

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 contain some service treatment records (STR). On 27 September 1972,

he was having a nervous and uneasy/unsettling feeling associated with taking Benadryl. In December of 1972 he reported feeling “boxed up” with some acute anxiety secondary to the situation with his company and impending chapter 10 discharge. He was given an acute anxiety reaction diagnosis. His supporting documents and service records also contained relevant medical information. He completed his separation medical examination on 20 December 1972. His Report of Medical Examination indicated no medical nor mental health concerns. In addition, the applicant’s periodic medical examinations marked normal for psychiatric and PULHES was 111111. His Report of Medical History show that he reported he was in good health, and he denied frequent trouble sleeping, depression or excessive worry, loss of memory or amnesia, or periods of unconsciousness, though did endorse nervous trouble of any sort. He reported that he’d been having episodes of anxiety while located in the environment of his current unit. A report of Mental Status Evaluation (date unreadable – 1972) is signed and present in his record but does not appear to indicate any responses to the questions outline on the form (nothing is checked, circled or highlighted). In a memo attached, the squadron surgeon stated that the applicant was able to distinguish between right and wrong and could adhere to the right, could understand the proceedings of a board action, that he met retention standards per AR 40-501, chapter 3 and that “It is doubtful that this man can benefit from a rehabilitative transfer and thus be a further service to the Army.” No other medical or mental health records were provided.

f. Per the applicant’s VA EHR, he is not service connected. He has not been engaged in any mental health care through the VA and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. A DVA letter confirmed the VA has determined his service to be dishonorable, hence, he has had no access to benefits. 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 treatment nor diagnoses.

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 condition or experience that mitigated 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 drinking problem is related to his request for an upgrade to his discharge.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserted he had a drinking problem. First and foremost, any substance use disorder, as a standalone diagnosis, is not currently a mitigating condition. Second, the applicant did not provide any service records or medical records that substantiated his assertion that a substance use disorder was present during his time in service. Third, there is evidence of an acute anxiety response present while he was in the service however this was after his misconduct and as a result of his issues with his unit and the process of being separated. Fourth, a majority of potentially mitigating mental health conditions would not have fully mitigated his misconduct (to include any potentially anxiety conditions), given the nature and severity of his charges. However, per Liberal Consideration guidance, the applicant’s assertion is sufficient to warrant the board’s consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined 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 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.

4/15/2024

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, 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 10, 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.
 - 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. Chapter 10 of the version in effect at the time provided that a member who committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses charged, type of discharge normally given under the provisions of this chapter, the loss of Veterans Administration benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. An Undesirable Discharge Certificate would normally be furnished an individual who was discharged for the good of the 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 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 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.

5. 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//