

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 August 2024

DOCKET NUMBER: AR20230006290

APPLICANT REQUESTS: amendment of his narrative reason for separation.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 149 (Application for Correction of Military Record)

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 item 20 of the DD Form 149, "Base Training, Where I was rape [sic]!" He also indicates in item 21 that post-traumatic stress disorder (PTSD), Other Mental Health, Sexual Assault/Harassment were issues/conditions related to his request. He further states in item 22, "there is new evidence where the mental evaluation has been in progress from 7 November 2017. The board did not consider it. The new evidence from doctor psychologist was all but together to show the reason the VARO grant me benefits because of the character of my actions during service prior and at Fort Hood. I was out of my mind.
3. A review of the applicant's service record shows:
  - a. He enlisted in the Regular Army on 30 January 1973.
  - b. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for the following:
    - (1) On 2 May 1973, for stealing several items from the Army/Air Force Exchange Service branch at Fort Knox, KY, on or about 20 March 1973; and for stealing a wristwatch from another Soldier on or about 26 March 1973. His punishment included restriction and extra duty for 30 days, suspended until 4 June 1973.

(2) On 24 May 1973, for failing to go at the time prescribed to his appointed place of duty, on or about 24 May 1973. His punishment included forfeiture of \$40.00 pay for one month, restriction, and extra duty for 14 days.

(3) On 29 January 1974, for leaving his appointed place of duty on or about 26 January 1974. His punishment included forfeiture of \$70.00 pay for one month and 14 days extra duty.

c. On 2 April 1974, before a special court-martial at Giessen, Germany, the applicant was found guilty of attempting to steal a stereo receiver, on or about 26 January 1974. His sentence included forfeiture of \$200.00 pay for 3 months and confinement at hard labor for 75 days. The sentence was approved on 26 April 1974, the portion of the sentence to confinement at hard labor in excess of 60 days and forfeitures in excess of \$125.00 per month were suspended for six months. The applicant was confined at the U.S. Army Confinement Facility, Mannheim Germany.

d. On 3 December 1976, the applicant was tried and convicted in a civil court for delivery of heroin on 17 March 1975. He was sentenced to be confined in the [REDACTED] Department of Corrections for 7 years.

e. On 3 January 1977, the applicant's immediate commander recommended the applicant's separation from service under the provisions of Army Regulation 635-206 (Discharge: Misconduct (Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion), for conviction by civil court. The commander noted the applicant was not under military control at the time and a physical examination and mental status evaluation were not attached to the recommendation. The intermediate commanders concurred with the recommendation.

f. On 25 February 1977, the applicant acknowledged receipt of the commander's intent and indicated he had been counseled and advised of the basis for the action to be taken against him under the provisions of Army Regulation 635-206. He requested consideration of his case by a board of officers but waived his right to appear in person before the board. He requested representation by his appointed counsel and waived his right to submit statements in his own behalf.

g. An Administrative Elimination Board was conducted to consider the applicant's case on 18 March 1977. The board found the applicant should be eliminated from the service and recommended the issuance of a discharge UOTHC.

h. On 25 August 1977, the separation authority approved the recommended separation under the provisions of Army Regulation 635-206. He directed the applicant be reduced to the lowest enlisted grade and issued a DD Form 794A (UOTHC Discharge Certificate).

i. The applicant's DD Form 214 (Report of Separation from Active Duty) reflects he was discharged on 15 November 1977, under the provisions of AR 635-206, separation program designator (SPD) code JKB, conviction by civil court, with a characterization of service of under other than honorable conditions. He served 1 year, 10 months, and 15 days of active service. He had 1067 days of time lost.

5. The applicant applied to the Army Discharge Review Board (ADRB) for a change in the type and nature of his discharge on 6 February 1980. The ADRB determined that the applicant was properly discharged and voted to deny his request.

6. Case Number AR20180000937 was considered by the ABCMR and after careful review, the Board determined based on the preponderance of the evidence, the applicant's case warranted clemency with an upgrade of his discharge to under honorable conditions (General).

7. Department of the Army, U.S. Army Inspector General Agency memorandum, dated 23 October 2023, Subject: Response to Request for Army Inspector General Records for Official Use – (applicant), which states, “the DAIG Records Release office searched the Army IG database – the Inspector General Action Request System – and did not locate any records responsive to your request.”

8. By regulation (AR 635-200), action will be taken to separate a member for misconduct such as commission of a serious offense. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter.

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

#### 10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a change to his narrative reason for separation. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 30 January 1973; 2) The applicant was discharged on 15 November 1977, under the provisions of AR 635-206, separation program designator (SPD) code JKB, conviction by civil court, with a character of service of under other than honorable conditions; 3) In 2018, the ABCMR determined based on the preponderance of the evidence, the applicant's case warranted clemency with an upgrade of his discharge to under honorable (general) conditions due to the applicant being found 100% SC for Schizophrenia and also found incompetent to stand

trial in September 1976 secondary to being diagnosed with an acute schizophrenic episode and marked mental retardation.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

c. The applicant requests a change to his narrative reason for separation. There is insufficient evidence the applicant was diagnosed with a mental health condition while on active service, but he was found to be experiencing severe psychosis and diagnosed by the VA with schizophrenia in 2017 (100%SC). In addition, he was found incompetent to stand trial in September 1976 secondary to being diagnosed with an acute schizophrenic episode and marked mental retardation.

d. 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 mitigates his misconduct and warrants a change to his narrative reason for separation.

e. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant has an extensive history of being diagnosed with intellectual disability and severe mental illness, which impacts his ability to determine the difference between right and wrong. The applicant has also been diagnosed with service-connected Schizophrenia by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has an extensive history of being diagnosed with intellectual disability and severe mental illness, which impacts his ability to determine the difference between right and wrong. The applicant has also been diagnosed with service-connected Schizophrenia by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? Yes, the applicant has an extensive history of being diagnosed with intellectual disability and severe mental illness, which impacts his ability to determine the difference between right and wrong. The applicant has also been diagnosed with service-connected Schizophrenia by the VA.

#### 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 request, supporting documents, and evidence in the records. The Board considered the applicant's statement and record of service, the frequency

and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by civil conviction. The Board found no error or injustice in the narrative reason for separation assigned during separation processing. The Board noted the applicant's discharge was previously upgraded; however, determined the facts and circumstances of his discharge remained the unchanged.

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.

10/28/2024

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. Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), 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.

2. Hagel Memorandum, dated 3 September 2014, states liberal consideration will be given in petitions for changes in characterization of service to service treatment records entries which document one or more symptoms which meet the diagnostic criteria of PTSD or related conditions. Special consideration will be given to VA determinations which documents PTSD or PTSD related conditions connected to military service. In cases in which PTSD or PTSD related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

3. Army Directive 2014-28 (Request to Upgrade Discharge by Veterans claiming PTSD), dated 3 November 2014, states the office of the Surgeon General will provide expert guidance to ARBA on clinical manifestations of PTSD and behavioral indicators to help ARBA assess the presence of PTSD and its potentially mitigating effects. When requested, the office will provide consultation to supplement ARBA's effort on complex cases that exceed ARBA's capabilities.

4. 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.

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 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.

6. 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.

7. 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//