

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 January 2024

DOCKET NUMBER: AR20230006481

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

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Personal Statement

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:

- he grew up in an abusive family with domestic violence/fighting; he joined the military to better himself; he served in Germany for a couple of years and hit a couple of snags while there
- he had an aggressive, disrespectful, and threatening platoon sergeant; he also had some disagreement with authorities and was barred from reenlistment as a result
- upon leaving Germany, he took leave to visit his mom and upon arrival at Fort Riley, he was shamed and/or defamed in front of others, and he was called names
- Note: the applicant marked "Sexual Assault/Harassment" on his application

3. Review of the applicant's service records shows:

a. He enlisted in the Regular Army on 1 August 1978, and he held military occupational specialty 19E, Armor Crewman. He served in Germany from around 1 December 1978 to on or about 29 November 1980.

b. While in Germany, he accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on:

- 12 October 1979, larceny of private property; his punishment included reduction to E-1 (suspended)
- 7 July 1980, being drunk and disorderly in a training area and disobeying a lawful order; his punishment included 20 days correctional custody and reduction to E-1.

c. On 26 November 1980, his commander initiated a Bar to Reenlistment against the applicant citing his misconduct of article 15 for larceny; deferred payment plan counseling, demonstration of a lack of required abilities of conduct, and on and off duty actions against standards. The applicant was furnished a copy of this bar but elected not to submit a statement on his own behalf.

d. He was reassigned to Fort Riley, KS around 22 January 1981. While at Fort Riley, he accepted NJP under Article 15 of the UCMJ as follows:

- 17 July 1981, being disrespectful in language towards a commissioned officer
- 7 August 1981, being disrespectful in language towards a noncommissioned officer
- Around 10 October 1981, failing to go at the time prescribed to his appointed place of duty
- 9 December 1981, willfully disobeying an order to help stack 105mm pallets, willfully disobeying a lawful order, and being disrespectful towards a commissioned officer

e. On 24 March 1982, court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) show she was charged with:

- one specification of being absent without leave (AWOL) from 16 December to 18 December 1981
- one specification of being AWOL from 31 December 1981 to 6 January 1982
- one specification of being AWOL from 8 January to 23 March 1982
- one specification of communicating a threat to Private First Class RLB , with intent to unlawfully obtain money from him
- one specification of unlawfully striking Private First Class RLB in the face with the back of his hand

f. On 25 March 1982, the applicant consulted with legal counsel. He was advised of the basis for his contemplated trial by court-martial and the maximum permissible punishment authorized under the UCMJ, of the possible effects of an Under Other Than Honorable Discharge if the request was approved, and of the procedures and rights

available to him. After this counseling, the applicant voluntarily and in writing requested to be discharged in lieu of court-martial under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. The applicant acknowledged that he understood he may request discharge in lieu of court-martial because of the charges which had been preferred against him under the UCMJ, at least one of which authorized the imposition of a bad conduct or dishonorable discharge. The applicant had been charged with four (4) specifications of violating Article 112a (wrongful use or possession of a controlled substance). He acknowledged the following:

- he understood that as a result of his request he could be discharged under other than honorable conditions and furnished an Under Other Than Honorable Conditions Discharge Certificate
- as a result of the issuance of such a discharge, he would be deprived of many or all Army benefits, he could be ineligible for many, or all benefits administered by the Veterans Administration
- he could be deprived of his rights and benefits as a veteran under Federal and State law
- he understood he could expect to encounter substantial prejudice in civilian life by reason of an undesirable discharge

g. The applicant's chain of command at the company, battalion, and brigade levels recommended approval of his discharge request with the issuance of a general discharge.

h. Following a legal review for legal sufficiency and consistent with the chain of command's recommendations, the separation authority approved the applicant's request to be discharged for the good of the service in lieu of court-martial with a characterization of service classified as Under Other Than Honorable Conditions. The separation authority also directed that the applicant be reduced to the lowest enlisted grade of private (E-1).

i. On 21 May 1982, the applicant was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service in lieu of court-martial, with an under other than honorable conditions character of service (Separation Code JFS and Reentry Codes 3, 3B, and 3C). He completed 3 years, 6 months, and 24 days of active service and he had 5 periods of lost time.

4. There is no indication he petitioned the Army Discharge Review Board within that board's 15-year statute of limitations.

5. By regulation, AR 635-200, Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized

punishment includes a punitive discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial.

6. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Under Other Than Honorable discharge be upgraded due to experiencing an MST, sexual harassment and mental abuse from superiors during his time in service.

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 01 Aug 1978 as an Armor Crewman. He was assigned overseas to Germany from 01 Dec 1978 - 29 Nov 1980.
- On 12 October 1979, applicant was charged with larceny of private property.
- On 7 July 1980, applicant was cited for being “drunk and disorderly in a training area” and disobeying an order.
- On 26 November 1980, a Bar to Reenlistment was initiated based on an Article 15 for “larceny; deferred payment plan counseling, demonstration of a lack of required abilities of conduct, and on and off duty actions against standards.”
- While stationed at Fort Riley (Jan 1981 to discharge), he was charged twice for being disrespectful (17 Jul and 07 Aug 1982), FTR (10 Oct 1981) and disobeying an order (09 Dec 1981). Applicant claimed at Fort Riley he was “shamed and/or defamed in front of others, and he was called names.”
- On 24 Mar 1982, court-martial proceedings were initiated for three AWOL episodes (16-18 Dec 1981, 31 Dec - 6 Jan 1982 and 08 Jan - 23 Mar 1982). Also included was threatening a PFC for money and backhanding the same PFC in the face. His request for discharge in lieu of court-martial trial was approved.
- Applicant’s separation packet was available for review. In addition, the applicant’s service record includes his DD Form 214 (Report of Separation from Active Duty), which shows that the Army discharged the applicant Under Other Than Honorable Conditions on 21 May 1982.

c. 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), Personal Statement, his DD Form 214, as well as documents from his service record. Applicant’s service packet was also available for review. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant asserted that an MST, sexual harassment and psychological abuse from his superiors were mitigating factors in his discharge. His service record and supporting documents did provide medical records during his time in service. However,

there was only a single behavioral health related document, a mental status examination (20 May 1982) with all normal findings and meeting retentions standards. Applicant also provided a personal statement that included his recall of some interpersonal dynamics in Germany (14 Feb 2023). He noted, "platoon Sgt was aggressive, for example disrespectful, using rank and threatening insults and challenging me because being smarter than him."

e. Per the applicant's VA EHR, he is not service connected for any medical or behavioral health concerns. There was a complete absence of any data in JLV.

f. In summary, while documentation was unavailable in the VA encounter notes (JLV) to support the contention that the applicant had experienced MST(s) during his time in service (likely due to the character of his discharge), under liberal consideration, applicant's self-assertion of MST is sufficient to establish occurrence of MST. Consequently, after reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is sufficient evidence of partially mitigating conditions, MST/trauma and stressor related symptoms which significantly contributed to the specific misconduct of AWOL episodes, disrespectful behavior, disorderly conduct, disobeying orders and mismanagement of funds. That said, MST and trauma-stressor related symptoms are not associated with larceny, threatening soldier and striking a soldier in the face - thus not mitigating for such actions.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, he experienced MST(s), sexual harassment, psychological abuse and, more likely than not, trauma-stressor related symptoms contributing to his AWOL episodes, disrespectful behavior, disorderly conduct, disobeying orders and mismanagement of funds while still on active duty.

(2) Did the condition exist or experienced occur during military service? Yes, there is applicant's assertion he encountered MST(s), sexual harassment, psychological abuse while on active duty. In addition, these experiences more likely than not led to trauma-stressor related symptoms.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, as per liberal consideration, applicant's self-assertion of an MST alone merits consideration by the board. It partially mitigates for AWOL episodes, disrespectful behavior, disorderly conduct, disobeying orders and mismanagement of funds, as MST(s) and trauma-stressor related symptoms are often associated with such misconduct. However, MST(s) and trauma-stressor related symptoms are not associated with larceny, threatening a soldier and striking a soldier in the face - thus not mitigatable for these actions.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 was charged with commission of an offense (AWOL) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry and under other than honorable conditions discharge. He willingly and in writing requested to be discharged in lieu of trial by court-martial. The Board found no error or injustice in his separation processing or character of service.

b. 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 sufficient evidence of in-service mitigating factors that mitigate some of his misconduct, specifically his AWOL episodes, disrespectful behavior, disorderly conduct, disobeying orders and mismanagement of funds, as MST(s) and trauma-stressor related symptoms are often associated with such misconduct. However, MST(s) and trauma-stressor related symptoms are not associated with larceny, threatening a soldier and striking a soldier in the face - thus not mitigatable for these actions. The Board determined his service clearly did not rise to the level required for an honorable discharge; however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board further determined no change to the reason for separation and/or associated separation and RE codes.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214 for the period ending 21 May 1982 showing:

- Character of Service: General, Under Honorable Conditions
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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, U.S. Code, 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 Army Board for Correction of Military

Records (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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 10 provides that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

a. Paragraph 3-7a states that 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 that 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.

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//