

IN THE CASE OF: ██████████

BOARD DATE: 31 January 2024

DOCKET NUMBER: AR20230006807

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

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter (two)
- Service Documents
- DD Form 214 (Report of Separation from Active Duty)
- Marriage License
- Character Letters (nine)
- Letter of Support
- Employment Application, Resume
- Civilian Letters of Promotion
- Civilian Employment Performance Management Process

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 was subjected to extreme verbal abuse by the noncommissioned officer in charge (NCOIC) of the motor pool, Staff Sergeant (SSG) ██████. After reporting the behavior and abuse to the company First Sergeant (1SG) ██████, he was assured the situation would be dealt with and resolved. Upon returning to his work location in the motor pool the behavior and abuse worsened and with greater frequency. During his court martial, where he plead guilty, his judge adjutant general (JAG) representative provided ineffective counsel. He presented no case or evidence of mitigating circumstances and called no character witnesses in his defense.

b. Having been unable to complete the first military occupational specialty (MOS) he was assigned. He was reassigned to another MOS and was assigned motor pool duties. The motor pool sergeant, SSG [REDACTED], began reporting for duty intoxicated and was verbally abusive to everyone and the applicant in particular. He reported the abuse, but it got worse. The abuse was affecting his health and the stress was taking a toll. He felt he wasn't getting the support needed to resolve the situation and decided to absent himself without permission on 16 October 1973. During his absence he met with 1SG [REDACTED] several times and explained he would return to duty when the situation had been dealt with. He voluntarily returned and was given permission for 24 hours to get married [marriage license enclosed]. He plead guilty and accepted his punishment. He was reduced and confined at hard labor. He was supposed to go back to his unit but was not allowed to contact his JAG officer and he would not be returned to his unit. He was not sentenced to discharge. Prior to his absence without leave (AWOL) he did not pose any disciplinary problems and at no time after.

c. After his discharge he found employment, raised a family. Most of his service was honorable. One indiscretion should not represent a life sentence. He has regretted his decision to go AWOL as a solution to the verbal abuse he received. He did not desert.

3. The applicant enlisted in the Regular Army on 24 July 1972 for four years. His MOS was 64C (Motor Transportation Operator).

4. The applicant was AWOL on 16 October 1973 and dropped from the rolls on 15 November 1973.

5. Before a special court martial at Fort Riley, KS, the applicant plead guilty and was found guilty of AWOL on or about 16 October 1973 until on or about 2 January 1974. The court sentenced him to confinement at hard labor for 45 days and reduction to private/E-1. The sentence was adjudged on 26 March 1974.

6. The sentence was approved on 1 May 1974 and would be duly executed. The applicant (SSN [REDACTED]) was to be confined in the Area Confinement Facility, Fort Riley, KS, or elsewhere as competent authority may direct.

7. Before a special court martial the applicant plead guilty and was found guilty of AWOL on or about 16 October 1973 until on or about 2 January 1974. The court sentenced him to confinement at hard labor for 45 days and reduction to private/E-1. The sentence was adjudged on 26 March 1974.

8. The sentence was approved at Fort Riley, KS on 2 May 1974 and only so much of the sentence as to reduction to private and confinement at hard labor for thirty days was approved and would be duly executed. The applicant (SSN [REDACTED]) was to be confined in

the Area Confinement Facility, Fort Riley, KS, or elsewhere as competent authority may direct.

9. A Statement of Medical Condition shows there had been no change in the applicant's medical condition since his last separation examination on 3 May 1974.

10. The applicants separation packet and the separation authority memorandum are not available for review.

11. The applicant was discharged on 5 June 1974. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Paragraph 13-5a (1), based on frequent acts of a discreditable nature with civil and military authorities. He was assigned Separation Program Designator 28B with Reenlistment Code RE-3. His characterization of service was UOTHC. He completed 1 year, 6 months, and 20 days of net active service this period. He was awarded the National Defense Service Medal.

12. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Paragraph 13-5a, by reason of misconduct, a discharge UOTHC is normally appropriate; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

13. The applicant provides:

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

b. Character letters that attest to the applicant being a self-starter with all the attributes a good supervisor, and the quality of his work was above average. He is knowledgeable, cheerful, and very thorough. He was a valued employee with a positive attitude and unselfishness.

c. Letters regarding civilian promotion that state, although he was qualified for promotion in reviewing his experience, they were unable to find that he met the minimum requirements for the classification, therefore he was unable to be placed on the promotion list.

d. A letter of support from his brother that attests to the applicant having received an unjust court martial and needlessly being subjected to extreme and harsh verbal abuse, as what we now call a whistle blower. He had ineffective counsel at his court martial.

e. A marriage license, employment application, resume, and civilian employment performance management process.

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

15. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Under Other Than Honorable Conditions discharge be upgraded to Under Honorable Conditions (General) discharge due to experiencing extreme verbal abuse and heightened stress due to a superior NCO's behavior toward applicant.

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 16 Oct 1973. His military occupational specialty was Motor Transportation Operator. He received the National Defense Service Medal.
- A Special Court Martial found applicant guilty for being AWOL from 16 Oct 1973 - 02 Jan 1974. On 26 Mar 1974, he was sentenced to 45 days of confinement and hard labor.
- The applicant's separation packet is unavailable for review. However, 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 05 Jun 1974.

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. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant asserted that pronounced verbal abuse and significant stress were mitigating factors in his discharge. His service record and supporting documents did contain an explanatory letter by applicant. He noted, "I was subjected to extreme verbal abuse by the NCOIC of the motor pool, SSG...After reporting the behavior and abuse to the company First Sergeant...I was assured the situation would be dealt with and resolved. Upon returning to my work location in the motor pool the behavior and abuse worsened and with greater frequency." Based on this documentation, there is a lack of evidence the applicant was diagnosed or treated for mitigating conditions that occurred during his time in service.

e. Per the applicant's VA EHR, he is not service connected for any medical or behavioral health concerns. There was no available data in JLV.

f. In summary, although applicant is not service connected for any behavioral health conditions (likely due to the character of his discharge), and a lack of BH documentation in JLV, there is the applicant's own assertion that he was subjected to frequent verbal abuse, as well as experiencing a high level of stress as a result. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is applicant's self-reported claim to support the conclusion that applicant more likely than not had a behavioral health condition that mitigates his misconduct (trauma and stressor related symptoms) during his time in service. As he reported, the mistreatment was significant enough to convince him that going AWOL was the only solution to avoid further denigration and behavioral health decline. Additionally, per Liberal Consideration the applicant's assertion of pronounced verbal abuse and significant stress, more likely than not experienced at the level of trauma and stressor related symptoms, warrants consideration by the board.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, his own assertion is that he was subjected to frequent verbal abuse and high stress that more likely than not led to trauma and stressor related symptoms.

(2) Did the condition exist or experience(s) occur during military service? Yes, there is applicant's self-report he encountered verbal abuse and significant stress while on active duty due to being verbally abused on a frequent basis by an NCO in his unit.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, there is adequate evidence of a mitigating BH condition while in military service. There is applicant's self-asserted claim of in-service verbal abuse and a high degree of stress that more likely than not produced "trauma and stressor related symptom" despite a lack of behavioral health documentation indicating any VA services, medical or behavioral health.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. One potential

outcome was to grant relief with an upgrade to general, under honorable conditions based on the medical opine, applicant’s post service achievements and his character letters of support. However, upon review of the applicant’s petition, available military records and medical review, the Board majority considered the advising official finding That there is adequate evidence of a mitigating BH condition while in military service based on the applicant’s self-asserted claim of in-service verbal abuse and a high degree of stress that more likely than not produced “trauma and stressor related symptom” despite a lack of behavioral health documentation indicating any VA services, medical or behavioral health.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the applicant’s AWOL/DFR. Consideration was given by the Board to the applicant’s post service achievements his character letters of support attesting to his integrity and honorable conduct and his remorsefulness for his misconduct. The Board however, notwithstanding the medical opine, found no error or injustice to support the applicant request for an upgrade based on his self-authored statement and behavioral health conditions. 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. Therefore, relief was denied.

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.

2/6/2024

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 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.

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 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.

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//