

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 January 2024

DOCKET NUMBER: AR20230007532

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his bad conduct discharge.

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

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20050005550, on 5 January 2006.
2. The applicant states he is requesting this change to his DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) character of service due to the fact he was subjected to systemic racism while he was in service. This caused him to have issues and ultimately being pushed out of the service early. He volunteered to join the service and wanted to have a long career which ultimately would end on his terms, not the way things happened. He was diagnosed with several mental health conditions that may have started from his time in service and the some of the issue he had. He is just trying to right the wrong that took place while he was in and have been for the past 40 plus years. [The applicant marked Other Mental Health on his application].
3. Review of the applicant's service records shows:
 - a. The applicant enlisted in the Regular Army for 3 years on 12 June 1969. He completed training and was awarded military occupational specialty 11B, light weapons infantryman.
 - b. Between 30 July and 7 November 1969, he accepted nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), on five occasions, for failure to obey a lawful order from a noncommissioned officer (NCO), on two occasions; assault; breach of peace; and being disrespectful in language toward an NCO, on two occasions. His punishments consisted of a reduction to E-1 (12 November 1969), forfeitures of pay, and restriction and extra duties.

c. The applicant served in Vietnam from 14 December 1969 to 18 February 1970.

d. On 29 January 1970, the applicant underwent a psychiatric evaluation at Headquarters, 1st Infantry Division, Office of the Division Surgeon, which diagnosed him as having a passive aggressive personality, chronic, severe. The examining psychiatrist stated that regardless of the outcome of judicial proceedings, it was his opinion that the applicant was not suitable for continued retention in the military. The psychiatrist recommended that he be considered for administrative separation under the provisions of Army Regulation (AR) 635-212 (Personnel Separations - Discharge Unfitness and Unsuitability), and stated:

- the applicant met the retention standards prescribed in AR 40-501 (Standards of Medical Fitness), chapter 3, and that there was no psychiatric disease or defect which warranted disposition through medical channels.
- the applicant was free from mental defect, disease, was able to distinguish right from wrong and able to adhere to the right.
- the applicant possessed the mental capacity to understand the nature and serious of the charges and proceeding against him and was intelligently able to cooperate or conduct himself in his own defense.
- the applicant was psychiatrically cleared for any administrative or judicial action deemed appropriate by command.

e. On 20 February 1970, the applicant was convicted by a special court-martial of the following offenses:

- Charge I: one specification of having received a lawful order from a superior commissioned officer to get up and join his squad, willfully disobeying a lawful order.
- Charge II: One specification of endanger the safety of his squad and platoon, at an ambush position by making excessive noise, moving around needlessly both within and outside the ambush site, and showing a total lack of concern for the safety of all at the ambush.
- Charge II (continued) one specification of, before the enemy, running away from his squad and platoon with the intention of avoiding impending combat.
- Charge III: One specification of feigning illness for the purpose of avoiding assigned duties.

f. The court sentenced him to forfeiture of \$82.00 per month for 6 months, reduction to pay grade E-1, confinement at hard labor for 6 months, and a bad conduct discharge.

g. On 20 March 1970, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The Record of Trial was forwarded to the appellate authority for appellate review.

h. The applicant was confined in the U.S. Army Installation Stockade, in Vietnam, pending completion of his appellate review.

i. On 6 August 1970, the U.S. Army Court of Military Review affirmed the findings and sentence as approved by the convening authority.

j. On 4 September 1970, he was convicted by a summary court-martial after being found guilty of the following violations:

- two out of three specifications of failing to go at the time prescribed to his appointed place of duty.
- one specification of willfully disobeying a lawful order
- one specification of behaving himself with disrespect towards a commissioned officer

k. The summary court-martial sentenced him to hard labor for 1 month and a forfeiture of \$88 pay per month for 1 month. The convening authority approved the sentence and ordered it executed.

l. The applicant was discharged from active duty on 14 September 1970. His DD Form 214 show she was discharged under the provisions of chapter 11 of AR 635-200 (Personnel Separations) with an under other than honorable conditions discharge (Separation Code 290, Reentry Code 4) and he was issued a Bad Conduct Discharge Certificate. He was credited with 9 months and 27 days of creditable active service, and he had 157 days of lost time (20 February to 29 July 1970) due to confinement.

m. On 6 January 1980, the Army Discharge Review Board (ADRB) considered his petition for an upgrade of his discharge. The ADRB determined that his discharge was proper and equitable and denied his request.

n. On 5 January 2006, the ABCMR considered his petition for an upgrade of his discharge and denied his request. The Board stated the applicant's trial by court-martial was warranted by the gravity of the offense charged. Conviction and discharge were affected in accordance with applicable law and regulation. The applicant has provided no evidence to show that his discharge was unjust at the time of his offense. He has not provided evidence sufficient to mitigate the character of his discharge.

4. By regulation (AR 635-200), a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

5. 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.

6. MEDICAL REVIEW:

a. Background: The applicant is requesting a reconsideration of his previous requests for an upgrade of his bad conduct discharge. He contends other mental health mitigates his discharge.

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 RA on 12 June 1969.
- Between 30 July and 7 November 1969, he accepted nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), on five occasions, for failure to obey a lawful order from a noncommissioned officer (NCO), on two occasions; assault; breach of peace; and being disrespectful in language toward an NCO, on two occasions.
- Applicant served in Vietnam from 14 December 1969 to 18 February 1970.
- On 20 February 1970, the applicant was convicted by a special court-martial of the following offenses:
- Charge I: one specification of having received a lawful order from a superior commissioned officer to get up and join his squad, willfully disobeying a lawful order.
- Charge II: One specification of endangering the safety of his squad and platoon, at an ambush position by making excessive noise, moving around needlessly both within and outside the ambush site, and showing a total lack of concern for the safety of all at the ambush. One specification of, before the enemy, running away from his squad and platoon with the intention of avoiding impending combat.
- Charge III: One specification of feigning illness for the purpose of avoiding assigned duties.
- The court sentenced him to forfeiture of \$82.00 per month for 6 months, reduction to pay grade E-1, confinement at hard labor for 6 months, and a bad conduct discharge.
- Applicant was discharged from active duty on 14 September 1970. His DD Form 214 show he was discharged under the provisions of chapter 11 of AR 635-200 (Personnel Separations) with an under other than honorable conditions discharge

(Separation Code 290, Reentry Code 4) and he was issued a Bad Conduct Discharge Certificate. He was credited with 9 months and 27 days of creditable active service, and he had 157 days of lost time (20 February to 29 July 1970) due to confinement.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, his ABCMR Record of Proceedings (ROP), and documents from his service record and separation packet. 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 states he is requesting this change to his DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) character of service due to the fact he was subjected to systemic racism while he was in service. This caused him to have issues and ultimately being pushed out of the service early. He volunteered to join the service and wanted to have a long career which ultimately would end on his terms, not the way things happened. He was diagnosed with several mental health conditions that may have started from his time in service and some of the issues he had. He is just trying to right the wrong that took place while he was in and have been for the past 40 plus years.

e. Due to the period of service, no active-duty electronic medical records were available for review. The applicant submitted a hardcopy of a mental status evaluation, dated 29 January 1970, as part of the separation process. The examining psychiatrist noted the applicant had no motivation for continued retention and wanted out of the Army anyway possible. It was the examiner's opinion; the applicant would be more of a liability than an asset. The applicant was diagnosed with having a passive aggressive personality. However, the applicant did not present with a mental health disorder, met retention standards, and was psychiatrically cleared for any administrative or judicial action deemed appropriate by command.

f. No VA electronic medical records were available for review and the applicant is not service connected. In addition, the applicant did not submit any medical documentation post-military service substantiating his assertion of having been diagnosed with several mental health conditions.

g. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates 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 mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant self-asserts having been diagnosed with several mental health conditions and experiencing systemic racism.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant self-asserted several mental health conditions, he did not provide any medical documentation substantiating any diagnoses.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board reviewed and concurred with the medical reviewer's determination that there is insufficient evidence to support the applicant had a behavioral health diagnosis that would mitigate his discharge. The court-martial sentenced him to a bad conduct discharge. All requirements of law and regulation were met. The Board found that an upgrade to the applicant's discharge was not warranted.

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 to amend the decision of the ABCMR set forth in Docket Number AR20050005550, on 5 January 2006.

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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 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 635-200 (Personnel Separations (then) and Active Duty Enlisted Administrative Separations (now)), provides for the separation of enlisted personnel from active duty.

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 a Soldier whose military record is satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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//