

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230007818

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded to no less than an under honorable conditions (general) discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letters (two)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)

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. His other than honorable acts were the result of his having become addicted to the opiate heroin while he was in Vietnam at the age of 19. When he first requested that his discharge be upgraded in 1979, after he was incarcerated from 1972 to 1978, opiate addiction was not considered a disease as it is today. He asks the Board to find it in the interest of justice to consider his application in conjunction with President Clinton's Executive Order to upgrade his discharge to no less than a general discharge.

b. He further states that in 1979 he appeared before the Army Discharge Review Board (ADRB) and was represented by an attorney recommended to him by the American Red Cross. His request was denied in 1979. He was told that some of his military records were missing, which he believes aided in his request being denied. When he returned from Vietnam in 1970 he realized his military record contained things he did while he was under the influence of heroin, that embarrassed him so he separated those pages from his military record in 1970 and by the time he went before

the ADRB, after he served six years in the penitentiary, he had forgotten that he had separated the pages from his military record and could not remember where he put them.

2. The applicant enlisted in the Regular Army on 24 February 1970 for three years. His military occupational specialty was 94B (Cook).

3. The applicant arrived station in Vietnam on or about 21 June 1970.

4. The applicant's commander-imposed a Bar to Reenlistment on 16 October 1970 and his chain of commander recommended approval.

5. On 16 October 1970, the applicant's commanding officer certified that he considered the applicant a substandard Soldier unfit for further military service in the Regular Army. The applicant was continually absent from morning formations, his personal appearance was far below that expected of a Soldier. He was extremely apathetic, and he could not or would not train for any job or work at any job.

a. He could not adjust to military life and his moral character as evidenced by his admitted heavy use of drugs is extremely deficient. He had received one Article 15 for disrespect towards a noncommissioned officer (NCO) and officer and failed to obey a lawful order. He was pending courts martial for communicating a threat, disorderly conduct, his being absent without leave (AWOL) and disobeying a lawful order.

b. Efforts to counsel him were to no avail. The applicant had read and understood the allegations made against him on 17 October 1970, and did not make a statement.

6. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 26 October 1970 for:

- willfully disobeying an order on or about 3 October 1970
- being disrespectful in language to a superior NCO on or about 3 October 1979
- behaving himself with disrespect toward a superior commissioned officer on or about 3 October 1970
- wrongfully communicating a threat to kill on or about 3 October 1970
- willfully disobeying an order on or about 3 October 1970
- his punishment consisted of reduction to private/E-1, forfeiture of \$70.00 per month for two months, restriction and extra duty

7. The applicant was notified on 26 October 1970 of his immediate commander's intent to initiate separation actions against him under the provisions of Army Regulation 635-212 (Personnel Separations-Discharge-Unfitness and Unsuitability), by reason of unfitness for military service. This action was based upon the repeated commission of

petty offenses, apathy, and inability to expend efforts constructively. He advised the applicant of the rights available to him.

8. The applicant's statement, dated 3 November 1970, states the applicant could not get a ride back to his unit, so he stayed at a friend's unit for the night. At 0900 hours he was awoken by the first sergeant. Two of the charges on the Article 15 regarding communicating a threat to kill them and receiving a lawful command from Captain/CPT M\_\_ were totally fallacious and this was provoked by CPT M\_\_ who came into his barracks and stated, "Get your Black a\_\_ up and get out of there." This racially prejudicial remark could have been calculated to elicit the applicant's remark. If he could be charged with disrespect toward an officer, CPT M\_\_ should be charged with conduct unbecoming an officer.

9. A Psychiatric Certificate, dated 5 November 1970, shows no psychiatric disease and recommended separation under the provisions of AR 635-212. The applicant was mentally responsible, able to distinguish right from wrong and to adhere to the right, had the mental capacity to understand board and judicial proceedings and participate in his own defense. He was not suffering from an incapacitating mental illness that warranted medical separation.

10. On 6 November 1970, the applicant's commander recommended the applicant be required to appear before a board of officers for the purpose of determining whether he should be discharged before the expiration of his term of service.

11. The applicant accepted NJP under Article 15 of the UCMJ on 7 November 1970 for failing to obey an order on or about 11 October 1970, and violating a lawful regulation by having his sleeves on his jungle fatigues cut off on or about 11 October 1970. His punishment consisted of forfeiture of \$25.00 pay.

12. The applicant consulted with counsel on 12 November 1970 and was advised of the basis for the contemplated action to accomplish his separation for unfitness under AR 635-212. He waived consideration of his case by a board of officers, and personal appearance before a board of officers. He acknowledged that he:

- had been afforded the opportunity to be represented by counsel
- elected not to submit statements in his own behalf
- may be deprived of many rights and benefits as a Veteran under both Federal and State law
- may encounter substantial prejudice in civilian life if he were issued an undesirable discharge

13. The applicant's commander formally recommended his elimination under the provisions of AR 635-212, based on unfitness. His commander noted the applicant

contributed nothing towards the accomplishment of the battalion's mission, nor did he expect him to in the future. His presence was a liability to the unit since he must constantly be watched and supervised to prevent him from going AWOL. He embarrassed the whole battalion by acting with extreme disrespect towards a Colonel while he was AWOL. The commander recommended he be eliminated for the service with an undesirable discharge. The chain of command recommended approval.

14. A Report of Medical History, dated 23 November 1970, shows in item 29 (Physician's Summary) trouble sleeping, depression and narcotic habit-sniffing cocaine, cites occasional use now, because of difficulty obtaining it.

15. The rehabilitative transfer waiver was approved on 1 December 1970.

16. The separation authority approved the recommended discharge on 2 December 1970, under the provisions of AR 635-212, paragraph 6a(1), for unfitness and directed the issuance of an Undesirable Discharge Certificate, with Separation Program Number (SPN) 28B (Unfitness).

17. The applicant departed Vietnam on or about 3 December 1970.

18. The applicant was discharged on 8 December 1970. His DD Form 214 shows he was discharged under the provisions of AR 635-212 by reason of unfitness. He was assigned SPN 28B with Reenlistment Code 4. His characterization of service was UOTHC. He completed 9 months and 11 days of net active service. He had 4 days of lost time. He was awarded or authorized the: National Defense Service Medal, Republic of Vietnam Service Medal, and the Republic of Vietnam Campaign Medal.

19. On 19 June 1972, 14 September 1978, and 27 January 1983, the ADRB determined the applicant was properly discharged and denied his request for a change in the type and nature of his discharge.

20. Regulatory guidance provides that an individual is subject to separation when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier further effort is unlikely to succeed.

21. In reaching its determination, the Board should consider the applicant's overall military service and statement in accordance with the published equity, injustice, or clemency determination guidance.

MEDICAL REVIEW:

1. The applicant requests an upgrade his UOTHC discharge to honorable. He contends his misconduct was related to Other Mental Health Issues.
  
2. 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 into the Regular Army on 24 February 1970; 2) He served in Vietnam from on or about 21 June 1970 to 3 December 1970; 3) On 16 October 1970, the applicant's commanding officer certified that he considered the applicant a substandard Soldier unfit for further military service in the Regular Army. The applicant was continually absent from morning formations, his personal appearance was far below that expected of a Soldier. He was extremely apathetic, and he could not or would not train for any job or work at any job; 4) As outlined in the ROP, on 26 October 1970 the applicant accepted NJP under provisions of the UCMJ Article 15 for various infractions that occurred on 3 October 1970; 5) The applicant was discharged on 28 October 1988, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial; 6) The applicant accepted NJP under Article 15 of the UCMJ on 7 November 1970 for failing to obey an order on or about 11 October 1970, and violating a lawful regulation by having his sleeves on his jungle fatigues cut off on or about 11 October 1970; 7) The separation authority approved the recommended discharge on 2 December 1970, under the provisions of AR 635-212, paragraph 6a(1), for unfitness and directed the issuance of an Undesirable Discharge Certificate. He was discharged on 8 December 1970, accordingly.
  
3. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. Included in the applicant's casefile was a Psychiatric Certificate dated 5 November 1970 that shows the applicant was mentally responsible, able to distinguish right from wrong and to adhere to the right, had the mental capacity to understand board and judicial proceedings and participate in his own defense. He was not suffering from an incapacitating mental illness that warranted medical separation. Also included in the casefiles was a Report of Medical History that shows the applicant self-reported depression characterized by "not liking to take orders from others," a history of sleep problems, and a narcotic habit characterized by cocaine use. No diagnoses were rendered, and the Report of Medical Examination conducted the same day found the applicant medically cleared for administrative separation. No other military BH-related records were provided for review. A review of JLV was void of any treatment history for the applicant and he does not have a service-connected disability. No civilian BH records were provided for review.

4. The applicant is requesting an upgrade his UOTHC discharge to honorable. He contends his misconduct was related to Other Mental Health Issues. A review of the records shows that on his Report of Medical History the applicant self-reported depression characterized by “not liking to take order from others” and a narcotic habit “sniffing cocaine” on his report of medical history. The applicant was not diagnosed with depression and given his only reported symptom was “not liking to take orders from others” he would not have met criteria for a depressive disorder. The applicant was also not diagnosed with a substance use disorder, but his reported cocaine use would have likely met criteria for a substance abuse diagnosis. However, substance abuse in absence of a comorbid BH condition is not afforded relieve under liberal guidance and as the applicant has not provided documentation supporting a diagnosis of a comorbid BH condition, there is insufficient evidence that his misconducted was related to or mitigated by Other Mental Health Issues.

5. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. However, the applicant contends his misconduct was related to Other Mental Health Issues, and per liberal guidance, his contention is sufficient to warrant the Board’s consideration.

6. Kurta Questions:

a. Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant contends his misconduct was related to Other Mental Health Issues.

b. Did the condition exist, or experience occur during military service? Yes.

c. Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records shows that on his Report of Medical History the applicant self-reported depression characterized by “not liking to take order from others” and a narcotic habit “sniffing cocaine” on his report of medical history. The applicant was not diagnosed with depression and given his only reported symptom was “not liking to take orders from others” he would not have met criteria for a depressive disorder. The applicant was also not diagnosed with a substance use disorder, but his reported cocaine use would have likely met criteria for a substance abuse diagnosis. However, substance abuse in absence of a comorbid BH condition is not afforded relieve under liberal guidance and as the applicant has not provided documentation supporting a diagnosis of a comorbid BH condition, there is insufficient evidence that his misconducted was related to or mitigated by Other Mental Health Issues.

BOARD DISCUSSION:

1. The Board reviewed the applicant's request to upgrade his character of service, his supporting documents, his statements, the evidence in the records, the ARBA BH Advisor opinion, and published Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests.

2. After carefully considering the applicant's request and all the available evidence, argument, and references to include the various Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests, the Board determined relief was not warranted.

a. The Board concurs with the ARBA BH Advisor opinion that the applicant's condition or experience did not actually excuse or mitigate the discharge. There is insufficient evidence that his misconduct was related to or mitigated by other mental health issues that would support liberal consideration.

b. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination.

c. 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:

Mbr 1    Mbr 2    Mbr 3

:            :            :            GRANT FULL RELIEF

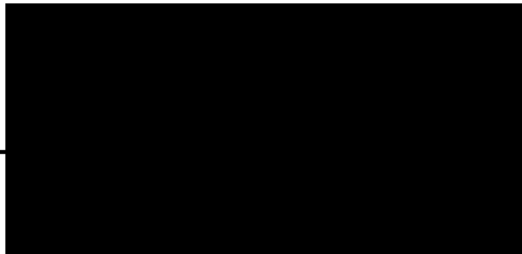
:            :            :            GRANT PARTIAL RELIEF

:            :            :            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.



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 (Personnel Separations – Enlisted Personnel), set forth the basic authority for the separation of enlisted personnel.
  - a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate.
  - b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial.
4. AR 635-212, in effect at the time, set forth the basic authority for the separation of enlisted personnel. Paragraph 6a (1) of the regulation provided, in pertinent part, that members involved in frequent incidents of a discreditable nature with civil or military authorities were subject to separation for unfitness. An undesirable discharge was normally considered appropriate.
  - a. Despite attempts to rehabilitate or develop him as a satisfactory Soldier further effort is unlikely to succeed.

b. Rehabilitation is impracticable (as in cases of confirmed drug addiction), or he is not amendable to rehabilitation measures (as indicated by medical and/or personal history record).

c. An unfitting medical condition is not the direct or substantial contributing cause of his unfitness.

d. Paragraph 1-9f (Issuance of an undesirable discharge) states an undesirable discharge is an administrative separation from the service under conditions other than honorable.

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 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; 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018, 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//