

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 February 2024

DOCKET NUMBER: AR20230008248

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge. Additionally, he requests a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the U.S. 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, 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 his life was threatened and he had to defend himself. He felt like there was an injustice to him as a servicemember. He tried to explain his situation to the Judge Advocate General officer, but he didn't want to hear it. Being African American, he felt like he was targeted a lot and there was nothing he could do about it. All he wants is to change his discharge so that he can get the benefits he deserves. He served his country, and he feels as though he deserves benefits. He has post-traumatic stress disorder (PTSD) from being in the service. He felt like the military didn't give him the help he needed. Things that happened to him, still weigh heavy on him.

3. On 17 November 1967, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 11B (Light Weapons Infantryman).

4. On 11 December 1967, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for leaving the company area without permission, on or about 8 December 1967. His punishment included forfeiture of \$20.00 per month for one month, six days restriction, and extra duty.

5. On 8 January 1968, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on the same day. His punishment included forfeiture of \$20.00 per month for one month, 14 days restriction, and extra duty.
6. On 24 April 1968, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 9 June 1968.
7. On 5 November 1968, the applicant was reported as AWOL a second time and remained absent until he returned to military authorities on 26 November 1969.
8. Before a summary court-martial on or about 10 December 1969, at Fort Ord, CA, the applicant was found guilty of one specification of going AWOL, from on or about 5 November 1969 [sic], until on or about 26 November 1969. The court sentenced him to reduction in grade to E-1, confinement at hard labor for 25 days, and forfeiture of \$42.00 pay for one month. The sentence was approved on 19 December 1969.
9. On 24 January 1970, the applicant arrived for service in the Republic of Vietnam.
10. On 8 April 1970, the applicant accepted NJP under Article 15 of the UCMJ, for wrongfully discharging his firearm in the sleeping quarters, circumstances such as to endanger human life, on or about 6 April 1970. His punishment included forfeiture of \$26.00 per month for one month, and seven days restriction and extra duty.
11. On 8 April 1970, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. The examining psychiatrist noted the applicant appeared to have an anti-social personality, had no rehabilitative potential, and recommended him for expeditious separation.
12. On 1 May 1970, the applicant accepted NJP under Article 15 of the UCMJ, for having marijuana in his possession. His punishment included reduction in grade to E-2, forfeiture of \$20.00 per month for one month, and 14 days restriction and extra duty.
13. On 23 May 1970, the applicant's commander notified him of his 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. As the specific reasons, the commander cited the applicant's attitude and actions since entering the Army, and his actions endangering the lives of other members of his unit with dangerous weapons.
14. On 30 May 1970, the applicant's commander formally recommended the applicant's discharge, under the provisions of Army Regulation 635-212, for unfitness.

15. On 16 June 1970, the applicant consulted with legal counsel and affirmed he had been advised of the basis for the contemplated separation action. Following his consultation, he waived his right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf and waived his right to further representation by military counsel. He acknowledged he could expect to encounter substantial prejudice in civilian life, if given either a general discharge (under honorable conditions) or an undesirable discharge.

16. Consistent with the chain of command's recommendations, the separation authority approved the recommended discharge on 20 June 1970, and directed the issuance of a DD Form 258A (Undesirable Discharge Certificate).

17. On 23 June 1970, the applicant departed the Republic of Vietnam.

18. The applicant was discharged on 24 June 1970. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-212, Separation Program Number 28B (Unfitness, frequent involvement in incidents of a discreditable nature with civil or military authorities). He was assigned Reentry Code 4. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 1 year and 5 months of net active service this period with 433 days of lost time.

19. Additionally, the applicant's DD Form 214 shows that he was awarded or authorized the National Defense Service Medal, the Vietnam Service Medal, Vietnam Campaign Medal, and the Sharpshooter (M-14) Badge.

20. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge, on three separate occasions. Each time, the Board voted to deny relief and determined his discharge was both proper and equitable.

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

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he was experiencing PTSD that mitigated his misconduct.

b. 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 was enlisted in the Regular Army on 17 November 1967; 2) Before a summary court-martial on 10 December 1969 the applicant was found guilty of going AWOL from 5-26 November 1969; 3) On 24 January 1970, the applicant deployed to the Republic of

Vietnam; 4) On 8 April 1970, the applicant accepted NJP for wrongfully discharging his firearm in the sleeping quarters; 5) On 1 May 1970, the applicant accepted NJP for having marijuana in his possession; 6) On 23 June 1970, the applicant departed the Republic of Vietnam; 7) The applicant was discharged on 24 June 1970, Separation Program Number 28B (Unfitness, frequent involvement in incidents of a discreditable nature with civil or military authorities). His service was characterized as UOTHC; 8) The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge, on three separate occasions.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted PTSD as a contributing and mitigating factor in the circumstances that resulted in his separation. There was no indication the applicant reported mental health symptoms while on active service. On 8 April 1970, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. The examining psychiatrist noted the applicant appeared to have an anti-social personality, had no rehabilitative potential, and recommended him for expeditious separation. A review of JLV was void of any behavioral health documentation, and the applicant receives no service-connected disability.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing PTSD while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing any mental health condition including PTSD while on active service. The applicant did go AWOL and was in possession of marijuana, which can be a sequela to PTSD, but this is not sufficient to establish a history of a condition during active service. Also, there is no nexus between PTSD and discharging his weapon in the sleeping quarters.

However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. The Board noted in addition, the opine found insufficient evidence beyond self-report the applicant was experiencing any mental health condition including PTSD while on active service. Although the applicant did go AWOL and was in possession of marijuana, which can be a sequela to PTSD, but this is not sufficient to establish a history of a condition during active service.

2. The Board noted, the applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board's consideration to weigh a clemency determination. The Board found the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year and 5 months of net active service this period with 433 days of lost time. Evidence in the record show the applicant reported mental health symptoms while on active service. The applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. The Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.



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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), provided the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

a. Paragraph 1-9d provided that an honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally had met the standards of acceptable conduct and performance of duty for Army personnel, or was otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 1-9e provided that a general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 1-9f provided that an undesirable discharge is an administrative separation from the Service under conditions other than honorable. It may be issued for unfitness, misconduct, homosexuality, or for security reasons.

5. Army Regulation 635-212, then in effect, provided the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable

nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

6. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

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//