

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008464

APPLICANT REQUESTS:

- a. Reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service
- b. As a new request for correction of his DD Form 214 (Report of Separation from Active Duty), to show:
  - a change in his narrative reason for separation to “Secretarial Authority” or “Release from Active Duty”
  - deletion of 499 days of lost time from Item 27 (Remarks)
  - and an appearance before the Board via video or telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief, dated 25 April 2023
  - Cover Letter, dated 25 April 2023
  - Brief in Support of Application, dated 25 April 2023
  - Exhibit Table of Contents, undated
  - Exhibit A, Department of Veterans Affairs (VA), Requests for Information, dated 1 July 2014 to 31 December 2019
  - Exhibit B, Service Treatment Records (6 pages), dated 10 January 1975 to 13 May 1975
  - Exhibit C, Military Personnel Records (4 pages), dated 4 October 1974 to 29 September 1975
  - Exhibit D, DD Form 214, for the period ending 3 January 1977
  - Exhibit E, two self-authored statements, dated 21 December 2017 and 9 January 2023

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 AR20180003952 on 27 September 2019.

2. The applicant states, in effect:

a. He was mistreated in basic training because he was a U.S. Army Reserve (USAR) Soldier. The treatment became even worse after he was given a shaving profile. He was referred to as a "Girl Scout." His sergeant did not like him, and he felt singled out. He was subjected to verbal insults and feared things might become physical. He was made to state his social security number twice while in the gas chamber. Everyone was laughing at him when he came out with tears running down his face and stuff coming out of his nose.

b. They were allowed to go home for Christmas. He was relieved to be away from basic, but he drank the whole time. He went to Fort Sill for advanced individual training (AIT) the torture became regular and so did his drinking. He was told he could not get orders to leave AIT because they lost his records. No one talked to him, and he had nothing to do from March to July of 1975. He felt completely isolated. He ended up drinking until he got sick every day. He was depressed and could not take it anymore. So, he went absent without leave (AWOL). No one reached out to him.

c. He was afraid of getting arrested. In September of 1975, he took a bus to Fort Dix and turned himself in. After everything he experienced, he just wanted to get out of the Army. He was never court-martialed. He took the offered undesirable discharge and went home. His records state he was discharged in 1977. This is incorrect. He was discharged in 1975, right after he turned himself in. His experience in the Army was terrible. He felt isolated and harassed most of the time, and they could not even get his discharge paperwork right.

d. The applicant notes other mental health as a condition related to his request.

3. Counsel states, in effect:

a. The applicant was convicted via summary court-martial for being AWOL from 11 July 1975 through 9 September 1975. He was a member of the USAR. He was not on active duty at the time of his discharge. He completed AIT in March 1975 and was wrongfully kept at Fort Sill, in a holding company, because the Army lost his orders. Members of the USAR are to be discharged from active service upon completion of their initial entry training. He did not receive orders to be placed with his unit. He was AWOL

from 11 July 1975 to 9 September 1975 and was then discharged. He was not AWOL after that period.

b. Prior to his discharge, the applicant experienced numerous errors committed by the Army. His discharge did not follow correct separation procedures. Counsel notes the following errors:

- the USAR failed to document his service after his record was lost
- no documents exist reporting the second alleged period of AWOL
- the applicant was never marked as a deserter
- court-martial charges must be preferred prior to a Chapter 10 discharge
- the applicant never requested a Chapter 10 discharge
- the applicant was not given an opportunity to meet with counsel

c. The depression the applicant experienced after being wrongfully kept in a holding company mitigates, excuses, and outweighs the misconduct which led to his discharge.

4. The applicant enlisted in the USAR on 8 October 1974 for a 6-year period. He was ordered to active duty, for a period of 18 weeks, for the completion of initial entry training with a report date of 22 November 1974.

5. Upon successful completion of basic combat training, the applicant reported to Fort Sill, OK, for the completion of AIT on or about 3 February 1975.

6. A DA Form 268 (Report for Suspension of Favorable Personnel Action), shows the applicant's commander initiated a suspension on 11 July 1975, as the applicant departed AWOL on that same date.

7. Two DA Forms 4187 (Personnel Action) show the following changes in the applicant's duty status:

- Assigned not joined to AWOL, on 11 July 1975
- AWOL to Dropped from Unit Rolls, on 11 August 1975

8. Before a summary court-martial, at Fort Dix, NJ, on 25 September 1975, the applicant pled guilty to and was found guilty of being AWOL, from on or about 27 June 1975 until on or about 9 September 1975. He was sentenced to forfeit \$150.00 pay for one month. The sentence was approved and ordered executed on 29 September 1975.

9. An AWOL-Deserter Verification Sheet, a corresponding DA Form 3836 (Notice of Return of U.S. Army Member from Unauthorized Absence), and a DA Form 4187, show the applicant was reported AWOL on 30 September 1975, and subsequently dropped

from the rolls on 30 October 1975. He surrendered to military authorities at Fort Dix, NJ, and was returned to military control on 29 November 1976.

10. A Personnel Control Facility Interview Sheet, dated 29 November 1976, shows the interviewer noted [the applicant] was being evicted from his home. He went AWOL to move his personal effects and stayed AWOL. Additionally, he went AWOL from AIT because he could not adjust.

11. On 30 November 1976, the applicant underwent a pre-separation medical examination. He was deemed medically qualified for separation.

12. Court-martial charges were preferred against the applicant on 1 December 1976, for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL, from on or about 27 June 1975 until on or about 9 September 1975, and from on or about 30 September 1975 until on or about 29 November 1976.

13. The applicant consulted with legal counsel on 3 December 1976.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged his understanding that by requesting a discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

c. He was advised he may submit statements in his own behalf. He elected not to submit a statement.

14. The applicant's immediate and intermediate commanders recommended approval of the request for discharge for the good of the service, further recommending the issuance of an undesirable discharge.

15. The separation authority approved the applicant's request for discharge for the good of the service on 14 December 1976, and further directed the issuance of a DD Form 258A (Undesirable Discharge Certificate) and reduction to the lowest enlisted grade.

16. The applicant was discharged on 3 January 1977, under the provisions of Army Regulation 635-200, Chapter 10, in the rank/grade of private/E-1. His DD Form 214 confirms his character of service was UOTHC, with separation code JFS and reenlistment code RE-4. He was credited with 10 months and 15 days of net active service, with 499 days of lost time from 27 June 1975 to 8 September 1975 and 30 September 1975 to 28 November 1976.

17. The ABCMR reviewed the applicant's petition for an upgrade of his discharge and correction of his DD Form 214 to show his middle name and a different date of birth on 27 September 2019. After careful consideration, the Board determined that based upon the applicant's short term of honorable service prior to a lengthy period of AWOL, as well as a lack of post-service character evidence, the Board concluded the characterization of service received at the time of discharge was appropriate. His request for a discharge upgrade was denied. The applicant failed to provide a birth certificate showing the requested date of birth. However, the Board did determine the middle name "Irvin" was consistent with all military records. He was issued a DD Form 215 (Correction to DD Form 214) on 4 May 2020, adding his middle name.

18. The applicant provides the following exhibits:

a. A VA Form 21-4138, dated 1 July 2014 and three additional requests for information to the VA, dated 13 February 2019 to 31 December 2019, show requests to obtain the applicant's service records.

b. Six pages of service treatment records, dated 10 January 1975 to 13 May 1975, show several visits to the troop medical clinic for gastrointestinal related issues and a shaving rash.

c. Four pages of military personnel records, dated 8 October 1974 to 28 September 1975, are summarized in the record of proceedings above, in pertinent part.

19. Discharges under the provisions of Army Regulation 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. A UOTHC characterization of service is normally considered appropriate. The appropriate separation code (SPD) and narrative reason, in effect at the time, were SPD "JFS" and narrative reason "administrative discharge – conduct triable by court-martial."

20. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

21. MEDICAL REVIEW:

a. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge to honorable, and a change of his narrative reason for separation to Secretarial Authority. He contends his misconduct was related Other Mental Health Issues.

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 enlisted in the USAR on 8 October 1974 for a 6-year period. He was ordered to active duty, for a period of 18 weeks, for the completion of initial entry training with a report date of 22 November 1974; 2) Upon successful completion of basic combat training, the applicant reported to Fort Sill, OK, for the completion of AIT on or about 3 February 1975; 3) Before a summary court-martial, at Fort Dix, NJ, on 25 September 1975, the applicant pled guilty to and was found guilty of being AWOL, from on or about 27 June 1975 until on or about 9 September 1975; 4) Court-martial charges were preferred against the applicant on 1 December 1976, for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL, from on or about 27 June 1975 until on or about 9 September 1975, and from on or about 30 September 1975 until on or about 29 November 1976; 5) The applicant consulted with legal counsel on 3 December 1976. After receiving legal counsel, he voluntarily requested discharge for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10; 6) The separation authority approved the applicant's request for discharge for the good of the service on 14 December 1976 and the applicant was discharged on 3 January 1977, under the provisions of Army Regulation 635-200, Chapter 10, in the rank/grade of private/E-1.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical records, AHLTA, was not reviewed as it was not used during the applicant period of service. Included in the applicant's casefiles is a Report of Medical Examination, dated 30 November 1976, that shows he was deemed medically qualified for separation. No additional military BH-related records were provided for review. A review of JLV was void of any BH treatment history for the applicant but shows he was enrolled in the VA Grant Per Diem (GDP) for housing assistance from 16 December 2014 to 1/30/2014 and was enrolled in the HUD/VASH program from February 2015 through September 2015. JLV was void of any other treatment encounters for the applicant and he does not have a service-connected disability. No civilian BH records were provided for review.

d. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge to honorable, and a change of his narrative reason for separation to Secretarial Authority. He contends his misconduct was related Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service. In absence of documentation supporting his assertion of Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of his discharge characterization or change to his narrative reason for separation, based on BH medical mitigation.

e. 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 mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

#### 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 contends his misconduct was related to PTSD

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service. In absence of documentation supporting his assertion of Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of his discharge characterization or change to his narrative reason for separation, based on BH medical mitigation.

#### BOARD DISCUSSION:

1. The Board determined 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.

2. 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 considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. Upgrade Discharge: Deny. 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 an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. 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 reviewer's finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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.

b. Reason for Separation: Deny. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that after he went AWOL and had court-martial charges preferred against him, he chose to be voluntarily discharged under chapter 10 in lieu of trial by a court-martial. Absent his AWOL, there was no reason to prefer court-martial charges against him. The underlying reason for his discharge was his AWOL and subsequent voluntary request for discharge in lieu of the court-martial. The only valid narrative reason for separation permitted under chapter 10 is "In Lieu of trial by a court-martial."

c. Lost Time: Deny. The regulation that governs the DD Form 214 requires an entry for lost time. This is an administrative entry that must be entered on the DD Form 214 regardless, whether the lost time was made good or not.



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:

1. As for the issue being reconsidered (discharge upgrade), 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 AR20180003952 on 27 September 2019.
2. As for the new issues (reason for separation and lost time), 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.

[Redacted Signature]

[Redacted Name]

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[Redacted Title]

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. Section 1556 of Title 10, U.S. Code (USC), 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.
  
2. 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. The regulation provides the ABCMR may, in its discretion, hold a hearing. 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.
  
3. Army Regulation 635-5 (Separation Documents), in effect at the time, established policies and procedures for completion and distribution of the DD Form 214. The instructions stated for: item 27, were to enter the number of days lost and inclusive dates of time lost under Title 10, USC, Section 972, and any periods of non-chargeable time after expiration of term of service.
  
4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. This regulation identifies the following separation codes, with the authority and narrative reasons for separation.

SPD Code	Narrative Reason	Regulatory Authority
JFS (KFS)	Administrative discharge conduct triable by court-martial (voluntary discharge)	Army Regulation 635-200, Ch 10
MFF	Secretarial Authority (voluntary release/transfer)	Army Regulation 635-200, para 5-3
LFF	Secretarial Authority (involuntary release/transfer)	Army Regulation 635-200, para 5-3
MBK	Completion of Required Active Service (voluntary release/transfer)	Army Regulation 635-200, Ch 4
LBK	Completion of Required Active Service (involuntary release/transfer)	Army Regulation 635-200, Ch 4

5. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. 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. 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.

b. Separations under paragraph 5-3 (Secretarial Plenary Authority) are the prerogative of the Secretary of the Army. This authority is exercised sparingly and seldom delegated. It is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army.

c. Separations under Chapter 4 apply to Soldiers separated upon expiration of enlistment or fulfillment of service obligation. Soldiers of the USAR and Army National Guard ordered to a period of active duty in excess of 90 days will, upon release from active duty, revert to the control of the appropriate Reserve Component. A Soldier being separated upon expiration of enlistment or fulfillment of service obligation will be awarded a character of service of honorable, unless the soldier is in entry-level status and service is uncharacterized.

d. Paragraph 3-7a provides 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.

e. Paragraph 3-7b provides 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.

6. 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 and 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. Standards for

review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or 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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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//