

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 March 2023

DOCKET NUMBER: AR20230008494

APPLICANT REQUESTS, IN EFFECT: reconsideration of his previous request to upgrade to his dishonorable discharge due to his mental health issues and prejudices against him at the time of his service.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 293 (Application for the review of discharge from the armed forces of the United States)

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 Dockets Number: AC83-09504 on 5 October 1983 and AR20180013230 on 9 May 2019.
2. The applicant states, in effect:
  - he had mental health issues that were made aware to his superiors when he attempted suicide, but no action was taken and he continued to serve
  - he faced prejudices against him during his service
  - he was harassed in his unit
  - his accuser, a commissioned officer, separated five minorities from the military according to the judge during his trial. The same judge also denounced the officer of being a super lieutenant (LT)
3. The applicant does not provide any medical evidence or documentation to support his claim of mental health issues.
4. The applicant's service record shows the following information:
  - a. He enlisted in the Regular Army 16 April 1980, for 3 years. He was assigned to Germany from 20 July to 2 October 1980.
  - b. All of the applicant's court-martial documents are not available for review in his

service record.

c. Memorandum: Subject: Report of Results of Trial shows the applicant received a Special Court Martial (SCM) on 16 October 1980. He was charged with the following offenses, pleas and findings:

- Charge I: one specification of disobeying an officer – plea guilty – found guilty
- Charge II: three specifications of disobeying a noncommissioned officer (NCO) and disrespect toward an NCO - plea guilty – found guilty
- Charge III: one specification of escaping custody - unknown
- Charge IV: one specification of assault – plea not guilty – found not guilty

d. He was sentenced to forfeitures of pay of \$250.00 per month for two months and to be confined at hard labor for two months.

e. SCM Order (SCMO) Number 45 reflects the sentence was approved and will be duly executed on 29 October 1980. He was confined to the U.S. Army Retraining Brigade, Fort Riley, KS from 23 October to 16 December 1980.

f. SCMO Number 279, dated 19 December 1980 shows the unexecuted portion of the approved sentence to confinement at hard labor for two months, and effective 19 December 1980, the unexecuted portion of the approved sentence to forfeiture of \$250.00 pay per month for two months, in the case of [applicant], adjudged on 16 October 1980, as promulgated in SCMO Number 45, not subsequently modified, was suspended until 4 March 1981, at which time, unless sooner vacated, the suspended portion of the sentence will be remitted without further action.

5. The applicant received three Article 15's, under the Uniform Code of Military Justice, for the following periods and offenses:

- 4 March 1981: for being absent from his unit from 5 to 6 February 1981, his punishment consisted of forfeitures of pay of \$116.00 and restriction and extra duty for 14 days. He did not appeal
- 1 August 1981: for being drunk on guard duty and for disobeying an order from a commissioned officer on 16 July 1981; his punishment consisted of forfeitures of pay of \$250.00 per month for two months (suspended) and extra duty for 45 days. He did not appeal
- 23 September 1981: for wrongfully having in his possession some amount of marijuana on 11 September 1981; his punishment consisted of forfeitures of pay of \$50.00 per month for two months and extra duty and restriction for 30 days (both suspended). He did not appeal

6. General Court-Martial Order (GCMO) Number 10, dated 18 February 1982, shows the applicant was charged with the following offenses:

- Charge I: one specification of on or about 12 August 1981, without authority, absent himself from his unit and remained absent until on or about 15 August 1981. Plea: guilty – found guilty
- Charge II: one specification of on or about 14 October 1981, he behaved himself with disrespect toward a second lieutenant, a superior commissioned officer by saying to him “f\*\*k you”, “don’t touch me again mother\*\*\*er” and “I’ll f\*\*k you up” and “Get the f\*\*k away from my car or I’ll run you over” or words to that affect. Plea – guilty – found guilty
- Charge III: three specifications of assault on a commissioned officer on or about 14 October 1981. Plea: guilty – found guilty of specification 1 and 3 and not guilty for specification 2
- He was sentenced to be confined at hard labor for eight years, and to be discharged with a dishonorable discharge. The sentence was adjudged on 17 December 1981

7. On 18 February 1982, the sentence in the applicant’s GCM was approved, but the execution of that portion thereof adjudging confinement at hard labor for eight years as is in excess of confinement at hard labor for fourteen months is suspended for one year, at which time, unless the suspension is sooner vacated, the suspended portion of the sentence will be remitted without further action.

8. On 18 February 1982, the convening authority suspended the period of confinement in excess of 14 months and approved the sentence as modified.

9. On 21 April 1982, the United States Army Court of Military Review, having found the approved findings of guilty and the sentence correct in law and fact, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are affirmed.

10. GCMO Number 786, dated 7 October 1982 reflects that the applicant’s sentence to dishonorable discharge and confinement at hard labor for eight years (but execution of that portion thereof adjudging in excess for fourteen months is suspended unless the suspension is sooner vacated, will be remitted without further action), has been affirmed pursuant to Article 66.

11. His DD Form 214 shows the applicant was discharged on 26 October 1982 under the provisions of Chapter 11-1, Army Regulation 635-200. He received a character of service of Dishonorable as a result of a court-martial. He completed 1 year, 8 months and 21 days of net active service this period. He also had lost time from 5 January to 26 October 1982 [295 days], due to being in confinement. He received an SPD code of "JJD" and a reenlistment code of "RE-4".

12. In a previous ABCMR Docket Number AC83-09504 on 5 October 1983, the applicant requested an upgrade of his characterization of service from dishonorable to honorable. The Board denied his request. The Board determined that the applicant failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a format hearing.

13. In a previous ABCMR Docket Number AR20180013230, on 9 May 2019, the applicant requested reconsideration of his previous application. The Board denied his request. The Board determined that after reviewing the application and all supporting documents, there was insufficient evidence to amend the decision of the ABCMR set forth In Docket Number AC83-09504 on 5 October 1983. The Board applied Office of the Secretary of Defense standards of liberal consideration and clemency to the complete evidentiary record, including the applicant's statement and did not find any evidence of error, injustice, or inequity; the applicant had limited creditable service, no wartime service and no mitigating circumstances for the misconduct. The Board agreed that the applicant's discharge characterization is appropriate for the misconduct.

14. Due to the applicant's claim of mental health issues and racial issues, the case is being forwarded to the behavioral health staff at the Army Review Boards Agency.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request to upgrade to his dishonorable discharge due to his mental health issues and prejudices against him at the time of his service. He contends he had mental health conditions and experienced racial discrimination that mitigates his misconduct. 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 16 April 1980; 2) All of the applicant's court-martial documents are not available for review in his service record. The applicant received a Special Court Martial on 16 October 1980 for disobeying an officer, three specification of disobeying an NCI and disrespect towards an NCO; 3) The applicant received three Article 15's for being absent from his unit from 5-6 February 1981, for being drunk on guard duty and for disobeying an order from a commissioned officer, and for being in possession of marijuana; 4) General Court-Martial Order, dated 18 February 1982, shows the applicant was charged with the following offenses: A) being AWOL from 12-

15 August 1981; B) disrespect toward a commissioned officer; C) two specifications of assault on a commissioned officer; 5) The applicant was discharged on 26 October 1982 under the provisions of Chapter 11-1. He received a character of service of Dishonorable as a result of a court-martial; 6) The ABCMR reviewed and denied the applicant's request for an upgrade on 5 October 1983 and 9 May 2019.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review. The applicant asserts he was experiencing mental health concerns and racial discrimination while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition, and he does not receive any service-connected disability for a mental health condition.

c. Based on the available information, it is the opinion of the Agency Behavioral Health 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 asserts he experienced mental health conditions and racial discrimination that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reporting experiencing mental health conditions and racial discrimination while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, the applicant reported experiencing mental health conditions while in active service. There is insufficient evidence beyond self-report the applicant was experiencing a mental health condition or racial discrimination while on active service. The applicant did engage in misconduct that can be associated with some mental health conditions and the experience of racial discrimination, but the presence of misconduct is not sufficient evidence of a mental health condition or racial discrimination. However, he contends he was experiencing a mental health condition and experience that mitigated his misconduct, and per Liberal Consideration his assertion is sufficient for consideration.

**BOARD DISCUSSION:**

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, frequency and nature of his misconduct and the reason for separation.

a. The applicant's trial by a general court-martial was warranted by the gravity of the offenses charged. His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a dishonorable discharge pursuant to an approved sentence of a general court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected.

b. 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 of in-service mitigating factors to overcome the misconduct. Additionally, the applicant does not provide 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.

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 to amend the decision of the ABCMR set forth in Dockets Number

- AC83-09504 on 5 October 1983
- AR20180013230 on 9 May 2019.



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. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. Chapter 11, paragraph 11-1, provided that a dishonorable discharge would be issued pursuant to an approved sentence of a general or special court-martial, after completion of the appellate review, and the sentence having been affirmed and ordered duly executed.

b. Chapter 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.

c. Chapter 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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. An under other than honorable conditions characterization was authorized when the reason for separation and was warranted by the circumstances of the case.

2. Title 10 United States Code, section 1552 governs operations of the ABCMR. Section f of this provision of law essentially states the authority of the ABCMR only extends to correction of a record. 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.

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

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. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health



conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

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.

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//