

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 February 2024

DOCKET NUMBER: AR20230008666

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of 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) with self-authored statement

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, in effect, he was a very young man when he joined the service. He had a problem with authority figures to include police officers and anyone with authority over him. The noncommissioned officer (NCO) in charge of him did not like him and made fun of him which made life in the Army unmanageable. He was laughed at during his court-martial and was told "they" would ensure he received a dishonorable discharge. He would like an upgrade so he can receive benefits. He notes post-traumatic stress disorder (PTSD) as a condition related to his request.
3. The applicant enlisted in the Regular Army on 5 September 1978 for a 3-year period. Upon the completion of initial entry training, he was awarded military occupational specialty 11C (Indirect Fire Infantryman).
4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on two occasions:
 - a. On 18 October 1977 (based upon the applicant's entry date, it appears to be the wrong year) , for absenting himself from his place of duty without authority, on or about 8 October 1977. His punishment consisted of forfeiture of \$50.00 pay, seven days of extra duty, and seven days of restriction.

b. On 28 December 1978, for failure to go at the time prescribed to his appointed place of duty, on or about 23 December 1978. His punishment consisted of forfeiture of \$25.00 pay.

5. Before a special court-martial on or about 9 February 1979, at Fort Benning, GA, the applicant pled guilty to and was found guilty of stealing \$157.00 in U.S. currency, the property of Private (PV2) [REDACTED], and stealing \$20.00 in U.S. currency, the property of PV2 [REDACTED], on or about 9 December 1978. The court sentenced him to forfeit \$200.00 pay per month for four months, confinement at hard labor for four months, and to be discharged from service with a bad conduct discharge. The sentence was approved and ordered duly executed, except for the portion adjudging a bad conduct discharge (BCD) which was suspended for 180 days, unless sooner vacated, the suspended portion would be remitted without further action. The record of trial was forwarded for appellate review.

6. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 25 April 1979, for being absent from his unit without authority (AWOL) on or about 22 April 1979 until on or about 23 April 1979. His punishment consisted of seven days of restriction.

7. He was formally counseled on two occasions between 6 June 1979 and 8 June 1979. Areas of emphasis covered in the counseling include, but are not limited to:

- absenting himself from his place of duty
- missing formation
- being in the improper uniform
- poor attitude and performance

8. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 28 June 1979, for failure to go at the time prescribed to his appointed place of duty, on or about 15 June 1979. His punishment consisted of forfeiture of \$98.00 pay, 14 days of extra duty, and 14 days of restriction.

9. On 29 June 1979, the U.S. Army Court of Military Review affirmed the findings of guilty and the sentence which was adjudged on 9 February 1979.

10. The applicant was formally counseled on 6 July 1979 for missing formation and being absent from his place of duty on that same date.

11. Two DA Forms 4187 (Personnel Actions) show the applicant was apprehended by Bell County Police and transported to jail for not paying a bail bondsman on 6 August 1979. He was dismissed without trial and returned to duty on 8 August 1979.

12. The applicant accepted non-judicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice, on 9 August 1979, for being disrespectful in language to his superior NCO and for willfully disobeying a lawful order from his superior NCO, on or about 12 July 1979, and for failure to go at the time prescribed to his appointed place of duty, on or about 16 July 1979. His punishment consisted of forfeiture of \$97.00 pay and 14 days of extra duty.

13. The applicant underwent a mental status examination on 15 August 1979. The examining provider determined there was no impression of significant mental illness, and he had the mental capacity to participate in board proceedings.

14. He underwent a medical examination on 15 August 1979. The relevant Standard Form (SF) 93 (Report of Medical History) and the corresponding SF 88 (Report of Medical Examination) shows the applicant reported being in good health. The examining provider determined he was medically qualified for separation.

15. The applicant's immediate commander-initiated a bar to reenlistment on 21 August 1979. The commander noted the applicant had no regard for formations. He was lazy and could not be found 90 percent of the time. He was disrespectful to all officers and NCOs, and his gear and locker were a disgrace to the U.S. Army.

16. The applicant's immediate commander notified the applicant on 21 August 1979 of his intent to initiate separation actions against the applicant under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, for frequent incidents of a discreditable nature with civil or military authorities.

17. On that same date, the applicant consulted with legal counsel and acknowledged he had been advised of the basis for the contemplated separation action. Following his consultation, he requested the right to personally appear before, and to have his case considered by a board of officers. He requested representation by counsel. He acknowledged he understood that he may be ineligible for many or all benefits as a Veteran under Federal and State laws, and he could expect to encounter substantial prejudice in civilian life as a result of the issuance of an UOTHC discharge.

18. The applicant's immediate commander formally recommended his separation from service under the provisions of Army Regulation 635-200, Chapter 14, by reason of misconduct. Additionally, the commander requested waiver of the requirement for rehabilitative transfer, further stating the applicant has shown complete failure at rehabilitation since being transferred into the unit. He has complete disregard for performing his duties and no discipline. Both intermediate commanders concurred with the recommendation.

19. Two DA Forms 4187 show the applicant was apprehended and placed in the ██████████ City Jail for the unauthorized use of a vehicle on 31 August 1979. He was released without trial and returned to duty on 2 October 1979.

20. A board of officers met on 9 October 1979 to determine if the applicant should be eliminated from service. The board found [the applicant] was undesirable for further retention due to frequent incidents of a discreditable nature with military authorities, and his rehabilitation was not deemed possible. In view of these findings, the board recommended that he be discharged due to misconduct with the issuance of a UOTHC discharge certificate.

21. Consistent with the board's findings and recommendations, the separation authority approved the recommended discharge on 5 November 1979, waived the rehabilitative transfer requirements, and directed a service characterization of UOTHC.

22. The applicant was discharged on 16 November 1979, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-33b, by reason of frequent involvement in incidents of a discreditable nature with authorities. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as UOTHC, with separation code JKA and reenlistment code RE-3, 3B. He was credited with 1 year and 10 days of net active service, with lost time from 9 February 1979 to 8 March 1979, 6 August 1979 to 7 August 1979, and 31 August 1979 to 1 October 1979.

23. Regulatory guidance provides when an individual is discharged under the provisions of Army Regulation 635-200, Chapter 14, by reason of misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if merited by the Soldier's overall record.

24. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

25. MEDICAL REVIEW:

a. The applicant requests an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. He contends his misconduct was related to PTSD.

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 into the Regular Army on 5 September 1978; 2) On 18 October 1978, for absencing himself from his place of duty without authority, on or about 8 October 1978; 3) On 28 December 1978, for failure to go at the time prescribed to his appointed

place of duty, on or about 23 December 1978; 4) Before a special court-martial on or about 9 February 1979, at Fort Benning, GA, the applicant pled guilty to and was found guilty of stealing \$157.00 in U.S. currency, the property of Private (PV2) [REDACTED], and stealing \$20.00 in U.S. currency, the property of PV2 [REDACTED], on or about 9 December 1978; 5) As outlined in the ROP the applicant accepted NJP under provision of Article 15 of the UCMJ on 25 April 1979 (AWOL), 28 June 1979 (FTR), and on 9 August 1979 (disrespect of an NCO, FTR, disobeying a lawful order); 6) Two DA Forms 4187 show the applicant was apprehended and placed in the [REDACTED] City Jail for the unauthorized use of a vehicle on 31 August 1979; 7) A board of officers met on 9 October 1979 to determine if the applicant should be eliminated from service; 8) Consistent with the board's findings and recommendations, the separation authority approved the recommended discharge on 5 November 1979. Accordingly, the applicant was discharged on 16 November 1979, under the provisions of Army Regulation 635-200, paragraph 14-33b.

c. 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 is a Report of Mental Status Evaluation, dated 15 August 1979, that reflects that the examining provider determined there was no impression of significant mental illness, and that the applicant had the mental capacity to participate in board proceedings. Also included in the casefile was a Report of Medical Examination, dated 15 August 1979, that shows the applicant reported being in good health and the provider determined him medically qualified for administrative separation. A review of JLV shows the applicant does not have a SC disability and has a single BH-related encounter whereby the applicant was seen by a VJO provider to assist in developing a plan for the applicant's reentry into society, once released from jail. The provider noted the applicant was open to receiving treatment at the VA and displayed no behaviors requiring further assessment or referral to crisis management. No diagnosis was rendered. No civilian BH records were provided for review.

d. The applicant requests upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. He contends his misconduct was related to PTSD. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on 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, the applicant contends his

misconduct was related to PTSD, and per liberal guidance, his contention 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 and he provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on medical mitigation.

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 that the applicant had an experience or condition during his time in service that mitigated his misconduct. The opine noted, the applicant's record is absent documentation supporting his assertion, finding there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on medical mitigation.

2. The Board found the applicant provided insufficient evidence of post service achievements or character letters of support that could attest to his honorable conduct that might mitigate the applicant discharge characterization. The Board found insufficient evidence of in-service mitigating factors for the misconduct to weigh a clemency determination. Furthermore, 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 (UO THC) discharge. Therefore, the Board denied relief.

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.

3/1/2024

X █

CHAIRPERSON
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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, 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. Section 1556 of Title 10, USC, 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.

3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. 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.

b. Paragraph 3-7b states 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.

c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

4. 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 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.

5. 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//