

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 February 2024

DOCKET NUMBER: AR20230008858

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Two DD Forms 214 (Certificate of Release or Discharge from Active Duty), for the period ending 16 September 1982 (Member 1 and 4 Copies)

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 he was doing well at the beginning of his career and promotion to specialist (SPC)/E-4 and stationed in Germany without any signification problems. After transferring to Fort Stewart, GA, he got in with some guys that were not the best character and did not have much respect for authority. There was alcohol involved in most instances of misbehavior. He was young, shy, and easily influenced. This led to his demotion and eventual discharge.

a. Since his discharge in 1982, he has retired from a 35-year union career in roofing. He has owned the same house since 1988 and overall represents a regular upstanding citizen.

b. He has not used his Department of Veterans Affairs (VA) services for any healthcare and does not have an VA diagnosis to rely on. He has been trying to use VA services, but cannot due to his type of discharge.

c. He is seeking to change the character of his discharge in order to receive potential disability ratings and/or ongoing needed care. He would also like to remove his 'bad mark' from his overall reliable and stable lifestyle.

d. The applicant annotates post-traumatic stress disorder (PTSD) as a related issue/condition to his request.

3. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 15 May 1979. He held military occupational specialty 63B (Light Wheel Vehicle/Power Generation Mechanic).

b. The applicant accepted nonjudicial punishment on/for:

- 23 February 1981, for wrongfully appropriating a military jeep, of a value of about \$10,000
- 28 March 1981, for willfully damaging a light switch of a value of \$6.96, by hitting it with a hammer
- 19 March 1982, for failing to go at the time prescribed to his appointed place of duty; his punishment included reduction to private first class (PFC)/E-3, suspended until 19 June 1982
- 22 March 1982, for failing to go at the time prescribed to his appointed place of duty; his punishment included reduction to PFC/E-3

c. On 8 April 1982, the punishment of reduction to the grade of E-3 imposed on 19 March 1981 and suspended, to be automatically remitted if not vacated before 19 June 1982, was vacated. The unexecuted portion of the punishment will be duly executed.

d. The applicant accepted nonjudicial punishment on 27 April 1982 for failing to go at the time prescribed to his appointed place of duty. His punishment included reduction to the grade of private (PV2)/E-2, suspended until 27 July 1982.

e. On 26 May 1982, the punishment of reduction to PV2/E-2 imposed on 27 April 1982, suspended, to be automatically remitted if not vacated before 27 July 1982, was vacated. The unexecuted portion of the punishment will be duly executed.

f. He accepted nonjudicial punishment on 16 July 1982 for willfully disobeying a lawful order to get up and go on police call. His punishment consisted of reduction to private (PVT)/E-1, forfeiture of \$275.00 pay per month for 2 months, extra duty for 45 days, to commence upon the completion of appellate actions, and restriction for 45 days, 15 days suspended until 14 January 1983.

g. On 21 July 1982, the punishment of restriction for 15 days imposed on 15 July 1982, suspended, to be automatically remitted if not vacated before 14 January 1983, was vacated. The unexecuted portion of the punishment will be duly executed.

h. The applicant accepted nonjudicial punishment on/for:

- 23 July 1982, for being absent without leave (AWOL) from 19 July 1982 to 21 July 1982
- 18 August 1982, for failing to go at the time prescribed to his appointed place of duty

i. On 12 May 1982, the applicant's intermediate commander approved a bar to reenlistment on the applicant.

j. On 21 July 1982, the applicant's immediate commander notified the applicant he was recommending the applicant be discharged from the Army before the expiration of his term of service due to patterns of misconduct, frequent, incidents of a discreditable nature with civil or military authorities. A discharge certificate under other than honorable conditions may be issued under this provision.

k. The applicant acknowledged receipt of the notification of separation on 21 July 1982.

l. On 21 July 1982, after consulting with counsel, the applicant was advised of the basis for the contemplated action to accomplish separation under the provisions of Chapter 14, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), its effect, the rights available to him, and the effect of any action taken by him in waiving his rights. He:

- waived consideration of his case by a board of officers
- waived a personal appearance before a board of officers
- elected not to submit statement in his own behalf
- understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- understood as the result of issuance of a discharge under other than honorable conditions, he may be ineligible for many or all benefits as a veteran under both Federal and State laws
- understood he may apply to the Army Discharge Review Board (ADRB) or ABCMR for upgrading

m. On 16 August 1982, a mental status evaluation was conducted on the applicant. The report shows:

- fully alert
- fully oriented
- mood: unremarkable
- thinking process: clear
- thought content: normal
- memory: good
- mentally responsible and had the mental capacity to understand and participate in the proceedings
- met retention requirements

n. On 13 September 1982, the separation authority approved the applicant's discharge under the provisions of AR 635-200, paragraph 14-33b(1). He would be furnished an Under Other Than Honorable Conditions Discharge Certificate (DD Form 794A).

o. On 16 September 1982, the applicant was discharged accordingly. His DD Form 214 shows he completed 3 years and 4 months of active service. It also shows in:

- item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): Army Service Ribbon, Overseas Service Ribbon, Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- item 24 (Character of Service): under other than honorable conditions
- item 25 (Separation Authority): Paragraph 14-33b(1), AR 635-200
- item 26 (Separation Code): JKA
- item 27 (Reenlistment Code): RE-3, 3B, 3C
- item 28 (Narrative Reason for Separation): Misconduct – Frequent incidents of a discreditable nature with military authorities
- item 29 (Dates of Time Lost During this Period): 19 July 1982 to 20 July 1982

p. There is no evidence the applicant applied to the ADRB within that board's 15-year statute of limitations.

4. By regulation, action will be taken to separate a member for misconduct when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier, further effort is unlikely to succeed; or rehabilitation is impracticable, or he is not amenable to rehabilitation measures.

5. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

## 6. MEDICAL REVIEW:

a. The applicant requests and upgrade of his 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 15 May 1979; 2) As outlined in the ROP, the applicant accepted punishment under provision of UCMJ on 8 separate occasion between 23 February 1981 to 18 August 1982 for various misconduct to include wrongfully appropriating a jeep, willful damage of property, FTR, AWOL, and disobeying a lawful order; 3) On 21 July 1982, the applicant's immediate commander notified him he was recommending the applicant be discharged from the Army before the expiration of his term of service due to patterns of misconduct, frequent, incidents of a discreditable nature with civil or military authorities; 4) On 13 September 1982, the separation authority approved the applicant's discharge under the provisions of AR 635-200, paragraph 14-33b(1); 5) On 16 September 1982, the applicant was discharged accordingly.

c. The VA electronic medical record (JLV), and ROP 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 Report of Mental Status Evaluation dated 16 August 1982 that shows the applicant was found to have the mental capacity to understand and participate in administrative procedures, was mentally responsible for his actions, and met medical retention standards of AR 40-501 Chapter 3. No other military BH-related documentation was provided for review. A review of JLV was void of any treatment history for the applicant. No civilian BH-related documentation was provided for review.

d. The applicant is requesting an upgrade of his UOTHC discharge to honorable and asserts 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 post-service and he provided no evidence supporting his assertion of PTSD. In absence of documentation supporting his assertion of PTSD, there is no evidence that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade of his discharge characterization.

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 would mitigate 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 asserts 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 post-service and he provided no evidence supporting his assertion of PTSD. In absence of documentation supporting his assertion of PTSD, there is no evidence that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade of his discharge characterization.

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 would mitigate his misconduct. The opine noted, the applicant's records were void of any BH diagnosis or treatment history for him during or post-service and he provided no evidence supporting his assertion of PTSD.

2. The Board commends the applicant on his post service achievements and his retirement of 35 year union career in roofing. However, the Board determined there is insufficient evidence of in-service mitigating factors for the misconduct to weigh a clemency determination. The Board found the applicant's service record exhibits numerous instances of misconduct during his enlistment period. Furthermore, the Board agreed 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. This board is not an investigative body. The Board determined despite the absence of the applicant's medical records, they agreed the burden of proof rest on the applicant,

however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant contentions of behavioral health concerns..

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.

3/4/2024

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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, 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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribes the basic authority for the separation of enlisted personnel.

a. Paragraph 1-13a (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an Honorable Discharge Certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.

b. Paragraph 1-13b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 14-33 (Other Misconduct) states action will be taken to separate a member for misconduct when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier, further effort is unlikely to succeed; or rehabilitation is impracticable or he is not amenable to rehabilitation measures.

3. 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 post-traumatic stress disorder (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.

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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, 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, on those conditions or experiences. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

5. 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.

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 based on equity, injustice, or clemency grounds, BCM/NRs 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.

6. 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//