

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 December 2024

DOCKET NUMBER: AR20230009588

APPLICANT REQUESTS:

- an upgrade his general discharge under honorable conditions
- in effect, set aside two nonjudicial punishments (NJP), conducted under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), and restore his rank/grade to specialist four (SP4)/E-4

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 racism was the reason for his NJPs and his general discharge; Sergeant (SGT) Co___, a known racist, constantly harassed him. "No blacks were allowed in his CP (command post), yet his entire platoon was African American. He boasted that his grandfather would be proud to see him in charge of (n-words)." On his application, the applicant has checked blocks for post-traumatic stress disorder (PTSD) and sexual assault/harassment but has included no supporting evidence and offers no further details.
3. A review of the applicant's service record shows:
 - a. On 28 May 1974, the applicant enlisted into the Regular Army for 4 years; he was 18 years old. Following the completion of initial entry training and the award of military occupational specialty 11B (Infantryman), orders assigned him to an infantry battalion in Hawaii; he arrived at his new unit, on or about 6 November 1974.
 - b. Effective 3 March 1976, the applicant's leadership promoted him to SP4. On 15 March 1976, the applicant accepted NJP for willfully disobeying SGT Co___'s

order to return to the CP for questioning as to why he failed to run physical training the day prior. The applicant also willfully disobeyed Lieutenant E___'s order to return to the CP (the same order given by SGT Co___). The punishment included reduction to private first class (PFC)/E-3.

c. On 3 August 1976, the applicant accepted NJP for failing to obey Sergeant First Class (SFC) L___'s order to report for duty. On 22 October 1976, the applicant accepted NJP from his battalion commander for multiple violations of the UCMJ.

(1) The battalion commander charged the applicant with the following:

- Article 86 (Failure to Report to a Place of Duty at the Time Prescribed), three specifications – failure to report for company formation on 21, 22, and 23 September 1976
- Article 86 (Absent without Leave (AWOL)) on 22 September 1976 from 1230 to 1630 hours
- Article 108 (Willful Destruction of Government Property Valued at less than \$50) – on 23 September 1976, the applicant tore an Enlisted Evaluation Report (DA Form 2166-5)
- Article 134 (General Article – Not Appearing in the Prescribed Uniform) – On 23 September 1976, the applicant wrongfully appeared without his Physical Training Uniform

(2) His punishment consisted of reduction to private (PV1)/E-1, the forfeiture of \$100 per month for 2 months, and extra duty and restriction for 30 days.

d. On 1 November 1976, the applicant's unit reported him as AWOL. On 4 November 1976, Staff Sergeants (SSG) prepared statements pertaining to the applicant:

(1) SSG T___ A. L___ affirmed that, since he had been in the platoon, the applicant had caused a lot of trouble and had to be told to do things several times. The applicant was a bad influence on the other Soldiers in the platoon.

(2) SSG J___ E. C___ stated, during the time the applicant was in his platoon, the applicant performed well below what was expected. The applicant was constantly late or AWOL, and his duty performance had gone from bad to worse. The applicant felt that the Army "had it in for him," but, in SSG C___'s view, the applicant had brought it all upon himself.

e. On 11 November 1976, after a 9-day absence, the applicant returned to his unit. On 16 November 1976, First Lieutenant A___ E. R___ wrote a statement, in which he reported that it had become evident that the applicant's level of performance since

arriving in the unit was unsatisfactory, and the applicant was both an administrative and morale burden on the unit. "(The applicant) has shown no response whatsoever in regards to repeated punitive type action initiated against him and, in my opinion, is not to be considered a favorable candidate for rehabilitative purpose(s). At this point in time, [applicant] lacks the initiative, maturity, and sense of responsibility in order to function as a team member within his squad."

f. On 4 December 1976, the applicant's company commander advised him, via memorandum, that he was initiating separation action against the applicant for misconduct, based upon frequent incidents of a discreditable nature with military authorities (chapter 13 (Separation for Unfitness or Unsuitability), paragraph 13-5a (1) (Unfitness), Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel)).

g. Also, on 4 December 1976, the company commander completed his separation recommendation. With the recommendation, he included a consolidated record of ten counselings given to the applicant, dated between 15 March and 12 November 1976, and reflecting his NJP actions and a pattern for failing to report to his appointed places of duty.

h. On or about 15 December 1976, after consulting with counsel, the applicant acknowledged counsel had advised him of the basis for the pending separation action. The applicant elected to waive his rights but submitted a statement in his own behalf. The applicant wrote the following:

(1) "Sir, I am not a bad guy. Things happened at the time they occurred and I was guilty then but felt I was right at the time. I don't understand myself too well. I guess everyone isn't blessed with the true gift of understanding. Well, I can't blame everyone for my mistakes. I'm the one who has problems that I rarely discuss. I keep most of my hostilities locked inside."

(2) "I have problems with my health that no one knew about until this past weekend. I have extremely bad nerves. I went to the hospital to see a friend who had been involved in an accident, and while I was there I began trembling and sweating, and almost blacked out. This also happened to me in basic training, but no one knew about it because I was the only one in the barracks at the time."

(3) "My mother has problems and needs me at home. My little sister is at an age where she is beginning to become a problem, and it's only the two of them in the house. I support my mom and sister. I give them most of my money each month." "When I first came to Hawaii, I tried to get assigned to Ft. Polk, (LA) so I could be closer to my mom and sister. I was so worried at the time that I went to Mental Hygiene, for all the good

that did. I became discouraged and gave up, feeling inside that no one really 'gives a damn.'"

(4) The applicant went on to describe family and personal relationship problems and disclosed he had gotten a girl pregnant back home; he felt he needed to be with her and his family, so, in January, he began asking about a discharge. "...I constantly bugged 1SG (first sergeant) J__ to talk to the CO (commanding officer) to see if he could persuade him to give me a discharge. I don't know if he even talked to the company commander, because nothing ever came of it."

(5) "In March when I received my first Article 15, it seemed to be unjust, due to the circumstances and not having seen a counsel. I signed it at the time because I had the impression that in some way it would help me get out. The real truth behind the Article 15 was never really brought to light. I was told, '[Applicant], get you're a__ in the CP.' This isn't really communication. This was never stated on my Article 15, but I was punished anyway and paid my dues money out of my check...That's how I got labeled as one who needs constant supervision...I say that's not so."

(6) "I was a driver on the Big Island and worked hard, waking up at all hours to deliver food to the guys in the field. My second Big Island trip was real good, as I was one of those best-by-test platoon Soldiers. The time the Australians came over, I was a volunteer aggressor. I have two certificates of training." He asked the separation authority not to weigh his actions after March too heavily against him; "I am only human and have to pay for my mistakes the same as any other man."

i. On 16 December 1976, the applicant's battalion commander recommended disapproval of a separation for misconduct and recommended a suitability discharge instead. He acknowledged the applicant displayed a "complete disregard for any rule or regulation," and that further retention would not be to the Army's advantage.

j. On 20 December 1976, the separation authority disapproved the company commander's misconduct discharge but approved a suitability separation and directed the applicant's general discharge under honorable conditions. On 7 January 1977, orders separated the applicant accordingly.

k. The applicant's DD Form 214 (Report of Separation from Active Duty) shows he completed 2 years, 7 months, and 1 day of his 4-year enlistment contract, with 9 days of lost time. The report additionally reflects the following:

(1) Item 9c (Authority and Reason) – Paragraph 13-5b (3) (Unsuitability – Apathy), AR 635-200 SPD (Separation Program Designator) "JMJ" (Unsuitability – Apathy, Defective Attitude, or Inability to Expend Effort Constructively)

(2) Item 10 (Reenlistment (RE) Code) – RE-4 (unwaivable disqualification)

(3) Item 26 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – National Defense Service Medal and a marksmanship qualification badge.

4. There is no indication the applicant applied to the Army Discharge Review Board for an upgraded character of service within the 15-year statute of limitations.

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 is applying to the ABCMR requesting an upgrade of his general, under honorable conditions discharge. On his DD Form 149, the applicant indicated Posttraumatic Stress Disorder (PTSD) and sexual assault/harassment are related to his request though included no supporting evidence and offered no further details. On his application he indicated the reason for his nonjudicial punishments (NJP) were due to racism and that he was constantly harassed by a known racist. 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 Regular Army (RA) on 28 May 1974 as an 11B (Infantryman), 2) on 15 March 1976, he accepted NJP for disobeying orders, 3) on 03 August 1976, he accepted NJP for failure to report for duty. On 22 October 1976, he accepted NJP from his Battalion Commander for multiple violations of UCMJ to include: failure to report to a place of duty at the time prescribed, going absent without leave, willful destruction of Government property valued at less than \$50 (tore an Enlisted Evaluation Report), and not appearing in the prescribed uniform, 4) the applicant was reported as absent without leave (AWOL) from 01 November 1976 to 11 November 1976, 5) on 4 December 1976, the applicant's company commander that he was initiating separation action against the applicant for misconduct, based upon frequent incidents of a discreditable nature with military authorities (chapter 13 (Separation for Unfitness or Unsuitability), paragraph 13-5a (1) (Unfitness), Army Regulation (AR) 635-200. His company commander included a consolidated record of ten counselings given to the applicant, dated between 15 March and 12 November 1976, and reflecting his NJP actions and a pattern for failing to report to his appointed places of duty as part of his recommendation, 6) the applicant was discharged on 07 January 1977 under the provisions of AR 635-200, Paragraph 13-5b (3) (Unsuitability-apathy), with a separation program designator of JMJ (Unsuitability – Apathy, Defective Attitude, or Inability to Expend Effort Constructively), and reenlistment code of RE-4.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. There were no in-service medical records available for review. Per the ROP, after the applicant was notified of his commander's intent to initiate separation on 15 December 1976 the applicant submitted a statement in his own behalf stating, "I have problems with my health that no one knew about until this past weekend. I have extremely bad nerves. I went to the hospital to see a friend who had been involved in an accident, and while I was there I began trembling and sweating, and almost blacked out. This also happened to me in basic training, but no one knew about it because I was the only one in the barracks at the time." Moreover, the applicant asserted he went to mental hygiene after getting assigned to Hawaii. [*Advisor's Note*: in-service BH notes were not available for review].

d. Review of JLV shows the applicant is 30% service-connected through the VA, for Migraine Headaches and Limited Motion of Wrist. He is not service-connected for any BH conditions. He initiated BH treatment through the VA IN 2016 as part of the substance abuse treatment program (SATP) for alcohol use. Records show that he received BH treatment through the VA on-and-off through 2023 and was diagnosed with Alcohol Use Disorder, Severe in Early Remission, Alcohol Dependence and Abuse, Anxiety, Depression, Chronic, Mild to Moderate, with Hallucinations, Cannabis Use Disorder Chronic Pain; however, none of these conditions were associated or attributed to his military service.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had an experience or condition in service that mitigated his misconduct. There were no in-service medical records available for review. Post-discharge, the applicant has been treated through the VA for several BH conditions to include Alcohol Use Disorder, Severe in Early Remission, Alcohol Dependence and Abuse, Anxiety, Depression, Chronic, Mild to Moderate, with Hallucinations, and Cannabis Use Disorder; however, it is of note that alcohol and substance use disorders do not constitute mitigating conditions. Furthermore, he is not service-connected for any of his diagnosed BH conditions nor were they associated with or attributed to his military service. Although the applicant checked 'sexual assault/harassment' on his application, it is unclear if he is requesting consideration of his application based on a history of Military Sexual Trauma (MST) as there were no details provided and his application specified that he experienced racism and was harassed by a known racist. Additionally, there is no medical documentation indicating he reported a history of MST. Although there is insufficient evidence that the applicant

was diagnosed with PTSD in-service, his self-assertion alone is worthy of the Board's consideration.

f. Kurta Questions:

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

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unclear. There were no in-service medical records available for review. The applicant has not been service-connected for any BH conditions through the VA. Although there is insufficient evidence that the applicant has been diagnosed with PTSD, his self-assertion alone is worthy of the Board's consideration. His VA medical records show that he was treated for several BH conditions post-discharge to include Alcohol Use Disorder, Severe in Early Remission, Alcohol Dependence and Abuse, Anxiety, Depression, Chronic, Mild to Moderate, with Hallucinations, and Cannabis Use Disorder; however, it is of note that alcohol and substance use disorders do not constitute mitigating conditions. Furthermore, he is not service-connected for any of his diagnosed BH conditions nor were they associated with or attributed to his military service. Although the applicant checked 'sexual assault/harassment' on his application, it is unclear if he is requesting consideration of his application based on a history of MST as there were no details provided regarding an assertion of MST and in his application he specified that he experienced racism and was harassed by a known racist. As there is insufficient medical documentation indicating that the applicant had PTSD or a mitigating BH condition in-service, and it is unclear if the applicant is asserting a history of MST, BH mitigation is unclear.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests.

a. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's conduct and the reason for separation. The applicant was separated for unsuitability. The Board found no error or injustice in the separation proceedings under the regulation and subsequent characterization of service assigned at separation. The Board noted the applicant's contention of post-traumatic stress disorder; however, reviewed and concurred with the medical advisor's review finding insufficient evidence the applicant had a condition or experience that mitigates his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

b. 1. After reviewing the application and all supporting documents, 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 review based on law, policy, and regulation. Upon review of the applicant's petition and military records, the Board determined that the applicant did not demonstrate by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant and by a preponderance of evidence that the contents of the nonjudicial punishment are substantially incorrect and support removal. Furthermore, the Board found the burden of proof rests with the applicant, and he provided no evidence to support his nonjudicial punishment was in error. The Board concluded based on the preponderance of evidence found in the military record the applicant's claim for removal of the Article 15, imposed on 22 November 2022 is not warranted.

2. Upon review of the applicant's petition, and the applicant's military record, the Board determined the applicant did not demonstrate by a preponderance of evidence that procedural error occurred prejudicial to the applicant and by a preponderance of evidence that the contents of the nonjudicial punishments support removal and 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.

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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. Title 10, USC, section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.

3. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 1-9d (Honorable Discharge) stated an honorable discharge was a separation with honor. Separation authorities should condition the issuance of an honorable discharge on proper military behavior and proficient duty performance. A separation authority could characterize a Soldier's service as honorable based on conduct ratings of at least "Good"; efficiency ratings of at least "Fair"; the Soldier could not have any general courts-martial, and the regulation allowed no more than one special court-martial conviction.

b. Section II (Secretarial Authority), paragraph 5-3 (Authority) stated the Secretary of the Army had the prerogative to separate enlisted personnel for the convenience of the Government, and such a separate would only be accomplished per the Secretary's authority. Except as delegated by this regulation or by special Department of the Army directives, the discharge or release of any enlisted member of the Army for the convenience of the government would, at the Secretary's discretion, result in the issuance of either an honorable or a general discharge certificate.

c. Chapter 13 (Separation for Unfitness or Unsuitability) applied to Soldiers found to be unfit or unsuitable for military service. Paragraph 13-5b (3), AR 635-200 permitted commanders to separate Soldiers who displayed an apathetic lack of interest, defective

attitudes, and/or the inability to expend effort constructively. Separation authorities could issue Soldiers separated per this provision either an honorable or a general discharge.

4. AR 635-5-1, in effect at the time, stated Soldiers separated under the provisions of paragraph 13-5b (3), AR 635-200 received "JMJ" for their SPD; the narrative reason for separation was " Unsuitability – Apathy, Defective Attitude, or Inability to Expend Effort Constructively."

5. AR 601-280, in effect at the time, included guidance on RE codes:

a. Paragraph 2-23 (Nonwaivable Disqualifications). Persons discharged under the provisions of chapter 13 of AR 635-200 were disqualified from receiving a waiver to reenter Army service.

b. Appendix D (RE Codes for Reenlistment in the Regular Army) stated:

- RE-1 – applied to former Soldiers who were qualified for reentry
- RE-3 – provided to a former Soldier who had a disqualification that could be waived
- RE-4 – given to a former Soldier with a nonwaivable disqualification

6. 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 former Soldier's service.

7. 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 to 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.

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, 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.

9. AR 27-10 (Military Justice), in effect at the time, prescribed the policies and procedures pertaining to the administration of military justice and implemented the Manual for Courts-Martial.

a. Paragraph 3-20 (Setting Aside and Restoration) stated NJP punishment was set aside and property, privileges, and rights restored when it was determined the punishment had resulted in a clear injustice.

b. Later versions of the regulation defined, "clear injustice" as the existence of an unwaived legal or factual error that clearly and affirmatively injured the Soldier's substantial rights; for example, when new evidence proved the Soldier did not commit the crime alleged. Uncorroborated claims were an insufficient basis to set aside a punishment.

10. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states:

a. Paragraph 2-2 (ABCMR Functions). The ABCMR decides cases on the evidence of record; it is not an investigative body.

b Paragraph 2-9 (Burden of Proof) states:

(1) The ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary).

(2) The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

//NOTHING FOLLOWS//