

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 April 2024

DOCKET NUMBER: AR20230009631

APPLICANT REQUESTS: in effect, reconsideration of a previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service, and a personal appearance before the board.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for The Review of Discharge)
- DD Form 214 (Armed Forces of The United States Report of Transfer or Discharge), 31 December 1970

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 AC85-03552 on 24 July 1985.
2. As a new argument, the applicant states the clemency act was not but should be applied. The applicant notes post-traumatic stress disorder (PTSD) as a condition related to his request. On his DD Form 149 and DD Form 293, the applicant indicates racial discrimination and separation code are related to his request; however, he provides no further details on these issues.
3. The applicant enlisted in the Regular Army on 24 September 1968, for 3 years. The highest rank/grade he held was private /E-2.
4. The applicant accepted nonjudicial punishment, under the provisions of Article 15 of the UCMJ, on 8 November 1968, for absenting himself from his unit and remaining so absent from on or about 3 November 1968 until on or about 7 November 1968. His punishment was 14 days restriction and 14 days extra duty.
5. Before a special court-martial, at Presidio of San Francisco, CA, on 7 August 1969, the applicant pled guilty to and was found guilty of one specification of on or about 9 March 1969, absenting himself from his unit and remaining so absent until on or about

28 July 1969. His sentence consisted of confinement at hard labor for six months and forfeiture of \$55.00 pay per month for six months. The sentence was approved on 26 August 1969. The confinement at hard labor was suspended for six months.

6. Before a special court-martial, at Fort Carson, CO, on 24 November 1969, the applicant was found guilty of three specifications of on or about 1 November 1969, being disrespectful in language toward a superior noncommissioned officer, disobeying a lawful order from his superior noncommissioned officer, and absenting himself from his appointed place of duty. His sentence consisted of confinement at hard labor for four months and forfeiture of \$82.00 pay per month for four months. The sentence was approved on 9 March 1970.

7. On 12 November 1970 and 13 November 1970, the applicant underwent a complete psychiatric evaluation and medical examination as part of his consideration for discharge due to his misconduct. His psychiatric evaluations noted, he met retention standards, had no disqualifying mental or physical defects, had a severe character and behavior disorder of the passive aggressive type, was mentally responsible, was able to distinguish right from wrong and adhere to the right, had the mental capacity to understand and participate in board proceedings, and was cleared for any administrative decision deemed appropriate by his command.

8. The applicant's record is void of a notification of separation memorandum and an election of rights memorandum acknowledging he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him.

9. On 20 November 1970, the applicant's immediate and intermediate commanders formally recommended the applicant's discharge from service under the provisions of Army Regulation (AR) 635-212 (Personnel Separations – Discharge – Unfitness and Unsuitability), by reason of unfitness.

10. On 18 December 1970, the separation authority approved the recommended separation action and directed the issuance of an undesirable discharge.

11. The applicant was discharged accordingly on 31 December 1970, under the provisions of AR 635-212, with separation program number (SPN) 28B by reason of unfitness. His service was characterized as UOTHC, in the grade of E-1, and reenlistment code "RE-4." His DD Form 214 contains the following entries:

a. He completed a total of 1 year and 26 days of net active service with 7 days of foreign service during the period covered.

b. Block 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized), shows he was awarded the National Defense Service Medal and the Vietnam Service Medal with one Bronze Service Star.

c. Block 30 (Remarks), shows he was discharged while in an absent without leave status and he had 438 days of lost time from:

- 10 March 1969 thru 27 June 1969
- 15 November 1969 thru 21 December 1969
- 7 January 1970 thru 8 March 1970
- 23 March 1970 thru 3 November 1970
- 28 December 1970 thru 31 December 1970

12. On his DD Form 293, the applicant lists medical records submitted in support of his request. However, he did not provide these records with his application.

13. The applicant petitioned the Army Discharge Review Board for upgrade of his service characterization on three separate occasions. On 15 April 1975, 4 August 1977, and 20 October 1980, after careful consideration the Board determined he was properly and equitably discharged.

14. The ABCMR considered the applicant's request for an upgrade of his UOTHC discharge on 12 August 1985. After reviewing the application and all supporting documents, the Board determined relief was not warranted. The Board found the evidence presented did not demonstrate the existence of a probable error or injustice as a basis for correction of the applicant's records.

15. On 25 September 2023, the Case Management Division (CMD), Army Review Boards Agency, sent a letter to the applicant requesting additional documentation related to the applicant's contention of PTSD. No additional documentation has been received from the applicant.

16. Regulatory guidance in effect at the time provided an undesirable discharge was normally considered appropriate for Soldier's discharged under the provisions of Army Regulation 635-212, by reason of unfitness.

17. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his request for an upgrade of his under other than honorable conditions characterization of service. He contends he was experiencing racial discrimination and resultant PTSD that mitigates his misconduct.

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:

- The applicant enlisted into the Regular Army on 24 September 1968.
- The applicant went before a special court-martial in August 1969 and was found guilty of absenting himself from his unit. He then went before a second special court-martial in November 1969 and was found guilty of being disrespectful in language toward a superior noncommissioned officer, disobeying a lawful order, and absenting himself from his unit.
- The applicant was discharged on 31 December 1970 for unfitness. His service was characterized as under other than honorable conditions. He was credited with 1 years, 26 days of net active service.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and hardcopy documentation provided by the applicant were also examined.

d. The applicant's DD Form 293 indicates he is pursuing a reconsideration for a change to his military record in accordance with the Clemency Act and on the basis of racial discrimination. He also indicated a related issue of PTSD on this form.

e. Records show that the applicant underwent a psychiatric evaluation in November 1970 as part of his consideration for discharge due to his misconduct. The evaluator indicated that the applicant met retention standards and did not have a disqualifying mental defect sufficient to warrant disposition through medical channels. The evaluator did note that the individual had a severe character and behavior disorder believed not to be amenable to rehabilitative efforts and provided a diagnosis of a Personality Disorder. This document also showed that the applicant was cleared for any administrative decisions deemed appropriate by his command.

f. A review of JLV showed two non-VA documents reflecting a history of mental health diagnoses and prescriptions. One of those documents showed a history of prescriptions in January 2008 for two psychiatric medications as well as a history of mental health diagnoses (non-PTSD) in January 2007. The other document showed a history of two mental health diagnoses in 2018 and 2013. Neither of these documents offer any information to support these diagnoses, nor do they indicate a timeframe for onset of symptoms or any relationship to the applicant's military service. The applicant has not been treated for PTSD at the VA and is not service connected for PTSD.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that, while there is sufficient evidence that the applicant was diagnosed with a mental health condition many years after his discharge, there is insufficient evidence to support the applicant had a behavioral health condition during his period of active service which would mitigate his misconduct. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing racial discrimination and resultant PTSD while on active service. He was diagnosed with a mental health condition by a civilian provider many years after his discharge.

(2) Did that condition exist or experience occur during military service? Yes, the applicant contends he experienced PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There was some evidence that the applicant was diagnosed with a mental health condition many years after his discharge. However, there is insufficient evidence that the applicant was diagnosed with a BH condition during active service. The applicant did go AWOL, which can be an avoidant behavior and a natural sequelae to PTSD. Yet the presence of misconduct is not sufficient evidence of the presence of a mental health condition. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The available evidence shows the applicant's chain of command separated him for unfitness. The Board found sufficient evidence of misconduct in the form of NJP, AWOL, and two court-martial convictions. The Board found no error or injustice in his available 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 during his military service 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.

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.

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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 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

2. Army Regulation 15-185 (ABCMR) states 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 635-200 (Personnel Separations – Enlisted Personnel), then in effect, provided the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

a. An honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

4. Army Regulation 635-212, then in effect, provided the policy, procedures, and guidance for eliminating enlisted personnel for unfitness and unsuitability. Action would be taken to separate an individual for unfitness when it was clearly established that despite attempts to rehabilitate or develop them further efforts were unlikely to succeed, rehabilitation was impracticable, or they were not amenable to rehabilitation measures. Individuals were subject to separation by reason of unfitness when one or more of the following conditions existed: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. An undesirable discharge was normally considered appropriate. However, an honorable or general discharge may have been awarded if the individual being discharged had been awarded a personal decoration or if warranted by the particular circumstances in a given case.

5. 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 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.

6. 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 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.

//NOTHING FOLLOWS//