

IN THE CASE OF: ██████████

BOARD DATE: 29 March 2024

DOCKET NUMBER: AR20230009671

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable and an appearance before the Board via video or telephone.

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

- DD Forms 149 (Application for Correction of Military Record) (two)
- Military Personnel Records (14 pages), dated 11 June 1979 to 1 July 1981

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 young, misguided, opinionated, and stubborn. The racial disputes leading to his discharge could have been avoided had he not retaliated. He was angry and resentful because he was treated unfairly. He made a complaint regarding racial discrimination and believes his discharge was retaliation for his "whistleblower complaint." He is remorseful for his behavior. The applicant notes post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), other mental health, and reprisal as issues related to his request.

3. The applicant enlisted in the Regular Army on 11 June 1979 for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 63B (Wheel Vehicle Mechanic). The highest rank he attained was private first class/E-3.

4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on seven occasions:

a. On 8 July 1979, for assaulting Private ██████ by striking her in the face with his hands, on or about 5 July 1979. His punishment consisted of forfeiture of \$50.00 pay and seven days at the Correctional Custody Facility (CCF).

b. On 26 September 1979, for disobeying a lawful order from his superior noncommissioned officer (NCO), on or about 24 September 1979. His punishment consisted of forfeiture of \$50.00 pay and seven days of extra duty and restriction.

c. On 7 February 1980, for failure to go at the time prescribed to his appointed place of duty, on or about 4 February 1980. His punishment consisted of forfeiture of \$104.00 pay and seven days at the CCF.

d. On 31 March 1980, for being disrespectful in language to his superior NCO, on or about 20 March 1980. His punishment consisted of reduction to private/E-1, forfeiture of \$104.00 pay, and seven days at the CCF.

e. On 11 September 1980, for absenting himself from his unit without authority (AWOL), on or about 2 September 1980 until on or about 4 September 1980. His punishment consisted of forfeiture of \$100.00 pay and seven days of extra duty and restriction.

f. On 25 September 1980, for failure to go at the time prescribed to his appointed place of duty, on or about 15 September 1980. His punishment consisted of reduction to private/E-2, forfeiture of \$121.00 pay, and seven days at the CCF

g. On 22 January 1981, for being AWOL, on or about 5 January 1981 until on or about 8 January 1981. His punishment consisted of reduction to private/E-2, forfeiture of \$130.00 pay, and 14 days of extra duty and restriction.

5. The applicant's commander initiated a Bar to Reenlistment on 5 March 1981. As reasons for the proposed action the commander noted the applicant was a rehabilitative transfer who showed no improvement. He had problems adjusting to military life. He was involved in frequent incidents of a discreditable nature, was disinterested in job related responsibilities, and was uncooperative with supervisors. The bar was approved on 7 April 1981.

6. The applicant's commander initiated a suspension of favorable personnel action on 10 April 1981, by reason of AWOL.

7. On 23 June 1981, the applicant's intermediate commander initiated nonjudicial punishment against the applicant under the provisions of Article 15 of the UCMJ, for being AWOL, on or about 10 April 1981 until on or about 7 May 1981. However, all charges were dropped for the purpose of an expeditious discharge from military service.

8. The applicant's record is void of the specific facts and circumstances surrounding his discharge processing. However, his DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 1 July 1981, under the provisions of

Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, by reason of misconduct – frequent incidents of a discreditable nature. His character of service was UOTHC, with separation code “JKA” and reenlistment code RE-3, RE-3B. He was credited with 1 year, 11 months, and 21 days of net active service, with lost time from 2 September 1980 to 3 September 1980, 5 January 1981 to 7 January 1981, and 10 April 1981 to 6 May 1981.

9. The applicant provides 14 pages of military personnel records, dated 11 June 1979 to 1 July 1981, which are summarized, in pertinent part, above.

10. Regulatory guidance provides when an individual is discharged under the provisions of Army Regulation 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

11. On 26 September 2023, the Army Review Boards Agency (ARBA), Case Management Division (CMD), contacted the applicant requesting medical documents to support his mental health issues. To date, no additional documentation has been received.

12. In the processing of this case, the U.S. Army Criminal Investigation Division (CID), searched their criminal file indexes, which revealed the following CID and/or Military Police Reports (MPR) pertaining to the applicant:

a. A CID Report of Investigation, dated 6 February 1981, shows the victim of larceny on or about 18 October 1980, when person(s) unknown entered his barracks room and stole articles of his clothing and stereo equipment.

b. MPR Number 1497-81, dated 18 February 1981 and the corresponding DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), shows the applicant was the subject of an allegation of aggravated assault. It was determined the applicant was not guilty.

c. MPR Number 4489-81, shows the applicant was under investigation for the wrongful possession of marijuana, on or about 27 May 1981. No action was taken due to insufficient evidence and improper apprehension and search.

13. On 17 October 2023, the applicant was provided a copy of the documentation from CID to allow him the opportunity to comment and/or submit a rebuttal. He did not submit a response.

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

MEDICAL REVIEW:

1. Applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149 and supporting documents, the ABCMR Record of Proceedings (ROP), the separation military documentation, and the VA medical records.

2. Due to the period of service, there are no active duty electronic medical records available for review.

3. The applicant is not service connected, and the VA has not diagnosed any BH conditions.

4. The applicant did not submit any medical documentation for review.

5. After review of all available information, the applicant self-asserted having PTSD and TBI during military service. However, there is no medical documentation to support the applicant's asserted PTSD or TBI. Due to the lack of medical evidence, there is no mitigation.

6. Kurta Factors:

a. Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. Self-asserted PTSD, Self-asserted TBI.

b. Did the condition exist, or experience occur during military service? Yes. The applicant asserted having PTSD and TBI during military service.

c. Does the condition or experience actually excuse or mitigate the discharge? No. The applicant self-asserted having PTSD and TBI during military service. However, there is no medical documentation to support the applicant's asserted PTSD or TBI. Due to the lack of medical evidence, there is no 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 applicant's contentions, the military record, and regulatory guidance were carefully considered.
2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant 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.
3. The applicant self-asserted having PTSD and TBI during military service, however, the applicant did not provide nor did his records reveal any medical documentation to support the his asserted PTSD or TBI. Due to the lack of medical evidence, the Board could not find anything in the record to mitigate the behavior leading to the applicant's discharge.

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.

6/6/2024

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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, 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. Title 10, USC, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 15-185 (ABCMR), prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides:
  - a. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR is not an investigative body and decides cases based on the evidence presented in the military records and the independent evidence submitted with the application.
  - b. Applicants do not have the right to a hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.
4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided:
  - a. 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. 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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A UOTHC discharge was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.

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; TBI; 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.

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 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//