

IN THE CASE OF: ██████████

BOARD DATE: 17 April 2024

DOCKET NUMBER: AR20230009722

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) character of service. Additionally, he requests an appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- High School Diploma, ██████████, dated 20 February 2006
- Certificate of Ordination, ██████████, dated 4 June 2008
- Award, Employee of the Year, dated 2007 to 2008
- Educator's Certificate, ██████████ Public Schools, dated 1 July 2006 to 30 June 2011
- Certificate of Completion, ██████████ Public Schools Safety Monitors, dated 6 April 2017
- two statements of support, dated 16 May 2023

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 AR20120005695 on 13 September 2012.

2. As a new argument, the applicant states:

a. He enlisted with a 9th grade education. He was happy to be accepted as a serviceman. He felt it was an honorable position in life, and he was ready to serve his country. Once in the service, he began to feel like he made a mistake. Racial issues were tense in Alabama. Many believed Black Soldiers were inadequate. He was constantly berated and harassed with racial slurs.

b. On 31 January 1976, he was assaulted by another Soldier, who taunted him with racial slurs on several occasions. The Soldier approached him from behind, pushed him, and struck him twice. Out of fear, he defended himself and hit him back. He was

not the perpetrator. He was the victim. He was arrested, thrown in the “brig” for 51 days, and unjustly charged with an Article 128 without proper representation. No one came to speak with him until he requested it. He asked if he could be released, he signed some papers, and they sent him home.

c. He went on to secure a job as the head custodian with [REDACTED] Public Schools. He was honored for running a vocational program that helps homeless adults obtain job skills. He serves as a Deacon at his local community church. He apologizes for his part in the incident. He should be entitled to his benefits like any other Soldier.

3. The applicant enlisted in the Regular Army on 3 September 1974 for a 3-year period. Upon the completion of initial entry training, he was awarded military occupational specialty, 54A (Chemical Operations Assistant). The highest rank he attained was private first class/E-3.

4. Before a summary court-martial, at Fort McClellan, AL, on 23 April 1976, the applicant pled not guilty to and was found guilty of unlawfully striking Private D.E.S. with his fist (Article 128), on or about 31 January 1976. He was sentenced to forfeit \$100.00 pay for one month. The sentence was approved and ordered executed on 26 April 1976.

5. The applicant underwent a medical examination, for the purpose of a Chapter 10 discharge, on 6 April 1977. A Standard Form (SF) 93 (Report of Medical History) and the corresponding SF 88 (Report of Medical Examination) show he did not report a significant medical history and was determined physically qualified for separation.

6. The applicant’s service record is void of the complete facts and circumstances surrounding his discharge. However, he was discharged on 15 April 1977, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. His DD Form 214 (Report of Separation from Active Duty) confirms his character of service was UOTHC, with separation code KFS (conduct triable by court-martial) and reenlistment code RE-3 and 3B. He was credited with 2 years, 5 months, and 22 days of net active service, with 51 days of lost time.

7. The ABCMR reviewed the applicant’s request for an upgrade of his UOTHC character of service on 13 September 2012. After careful consideration, the Board determined that, although the applicant’s post-service conduct was noteworthy, the evidence presented did not demonstrate the existence of a probable error or injustice. His request for relief was denied.

8. As new evidence, the applicant provides:

a. Six certificates dated 20 February 2006 to 6 April 2017, which highlight some of his post-service accomplishments to include, the award of his high school diploma, an employee of the year award, his ordination and election as an Elder, and an adult vocational educator's certificate.

b. In two statements of support, dated 16 May 2023, the authors attest to the quality of the applicant's work and his excellent leadership as head custodian and part-time teacher. He is very talented and passionate about reaching his goals. He has had a positive impact on the lives of many young men and young ladies.

9. Administrative separations under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

10. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

11. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) character of service. He contends he was experiencing a mental health condition related to racial discrimination that mitigate 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: 1) The applicant enlisted in the Regular Army on 3 September 1974; 2) Before a summary court-martial, on 23 April 1976, the applicant pled not guilty to and was found guilty of unlawfully striking another Soldier with his fist; 3) The applicant's service record is void of the complete facts and circumstances surrounding his discharge. However, he was discharged on 15 April 1977, Chapter 10, conduct triable by court-martial. His character of service was UOTHC; 4) The ABCMR reviewed and denied the applicant's request for an upgrade of his character of service on 13 September 2012.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted mental health conditions and racial discrimination as contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV provided insufficient evidence

the applicant has been diagnosed with a service-connected mental health condition or has been awarded any service-connected disability.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of mental health condition or experience.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reports experiencing a mental health condition and racial discrimination while on active service, which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing a mental health condition and racial discrimination while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition or racial discrimination while on active service. The applicant did engage in violent behavior, which could have been an attempt to defend himself, but this is not sufficient to establish a history of a condition or racial discrimination during active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation at this time as the result of mental health condition or experience. However, the applicant contends he was experiencing a mental health condition or experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 medical review, the Board considered the advising official finding insufficient evidence beyond self-report the applicant was experiencing a mental health condition or racial discrimination while on active service.

2. However, the Board agreed that the applicant's case was harsh and warrants clemency based on the applicant's minor infraction, his post service achievements, community service and the facts and circumstances that led up to the discharge. The Board determined there is sufficient evidence to warrant clemency with an upgrade of the applicant's discharge to under honorable (general) conditions.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by re-issuing the applicant a DD Form 214 for the period ending 15 April 1977 to show his characterization of service as under honorable (general) conditions.

4/19/2024

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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. AR 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 provided and the independent evidence submitted with the application.

b. The ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

2. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. 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.

c. 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.

3. 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 (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.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs, on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//