

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 April 2024

DOCKET NUMBER: AR20230010284

APPLICANT REQUESTS: the 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)

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, in effect, he was already an alcoholic at age 15; his father signed him up for the Army when the applicant turned 17.

a. Someone introduced him to drugs while the applicant was in advanced individual training (AIT). Later, at Fort Lewis, WA, he sought help from his platoon sergeant, but the only thing that happened was that the dealer moved to another company; no one offered the applicant any kind of treatment. As time went by, things just got worse.

b. The applicant is seeking this upgrade so he can be buried as a Veteran; he adds that his father, brother, and son are all Veterans. Receiving burial benefits is the only thing he wants, and he points out that he has never made any requests before this because he understood that he was the problem; however, he declares, "THE UNITED STATES ARMY NEVER ADDRESSED MY PROBLEM" (emphasis added by applicant).

3. A review of the applicant's service record reveals the following:

a. On 12 June 1974, after obtaining his father's permission, the applicant enlisted into the Regular Army for 3 years. Upon completion of initial entry training at Fort Polk, LA, and the award of military occupational specialty 11B (Light Weapons Infantryman), orders assigned him to Fort Lewis; he was supposed to arrive, on 21 October 1974, but he did not report to the replacement company until 16 November 1974.

b. On 26 November 1974, the applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for having been absent without leave (AWOL), from 21 October to 16 November 1974 (26 days); punishment consisted of a forfeiture of \$75. Orders subsequently assigned him to an infantry company at Fort Lewis.

c. On 11 February 1975, the applicant accepted NJP from his company commander for having been AWOL, from 5 to 8 January 1975; as punishment, the commander directed a forfeiture of \$89 and restriction for 7 days. On 28 February 1975, the applicant's leadership promoted him to private first class (PFC)/E-3, and the orders listed the effective date as 1 February 1975.

d. On 16 June 1975, the applicant accepted NJP from his company commander for having been AWOL, from 27 to 30 May 1975. The commander's punishment included 7-days' confinement, reduction to private (PV2)/E-2, and a forfeiture of \$93. On 17 June 1975, the applicant filed an appeal with his battalion commander; on 26 June 1975, the battalion commander directed the replacement of "confinement" with "correctional custody" and the reduction of the forfeiture to \$89.

e. On or about 14 September 1975, the applicant's unit reported him as AWOL, and, on 13 October 1975, dropped him from unit rolls. On 28 October 1975, after a 44-day absence, the applicant surrendered himself to military authority at Oakland Army Base, CA; orders transferred him to the U.S. Army Personnel Control Facility (PCF) at Fort Ord, CA.

f. Effective 19 November 1975, the PCF placed the applicant on excess leave. Effective 1 December 1975, orders reduced the applicant to private (PV1)/E-1.

g. The applicant's separation packet is unavailable for review; however, the applicant's service record includes his DD Form 214 (Report of Separation from Active Duty), which shows that, on 17 December 1975, the Army discharged the applicant under other than honorable conditions. The DD Form 214 additionally reflects the following:

- Item 9c (Authority and Reason) – chapter 10 (Discharge for the Good of the Service), Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), SPD (Separation Program Designator) "KFS" (Conduct Triable by Court-Martial)
- Item 10 (Reenlistment Code (RE)) – RE-4
- Item 18a (Record of Service – Net Active Service This Period) – 1 Year, 3 months, and 18 days
- Item 21 (Time Lost) – 107 days

- Item 26 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – Expert Marksmanship Qualification Badge with Rifle Bar

4. The ABCMR does not grant requests for upgraded characters of service solely to make someone eligible for Veterans' benefits; however, in reaching its determination, the Board can consider the applicant's petition, his evidence and assertions, and his service record in accordance with the published equity, injustice, or clemency guidance.

5. Clemency guidance to the Boards for Correction of Military/Navy Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief 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. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

6. Published guidance to the BCM/NRs clearly indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he was experiencing mental health conditions that mitigate his misconduct. 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 12 June 1974; 2) The applicant accepted nonjudicial punishment for being AWOL or was found AWOL four times between October 1974 and October 1975; 3) The applicant's separation packet is unavailable for review. However, the applicant's service record includes his DD Form 214, which shows that, on 17 December 1975, the applicant was discharged, Chapter 10-For the Good of the Service. His service was characterized as UOTHC.

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

c. The applicant noted mental health conditions as a contributing and mitigating factor 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. The applicant reported experiencing an alcohol and substance abuse problem before and/or during his enlistment. 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.

d. 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 opinion 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 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 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 while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions, but this is not sufficient to establish a history of a condition during active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience. However, the applicant contends he was experiencing a mental health condition that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 DoD guidance for liberal consideration of discharge upgrade requests. The applicant was charged with commission of an offense punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested

discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his 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 advisory opinion finding insufficient evidence to support the applicant had condition or experience 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:

Mbr 1 Mbr 2 Mbr 3

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| : | : | : | 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, 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, United State Code, section 1556 (Ex Parte Communications Prohibited) 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.

3. AR 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Chapter 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. Chapter 1-9e (General Discharge). A general discharge was a separation from the Army under honorable conditions, where the Soldier's military record was not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 permitted a Soldier to request discharge for the good of the service when they had committed an offense or offenses which, under the UCMJ and the Manual for Courts-Martial, United States 1969 (Revised Edition), included a bad conduct or dishonorable discharge as a punishment. The Soldier could submit such a request at any time after court-martial charges were preferred. Once approved, an undesirable discharge was normally furnished, but the discharge authority could direct either an honorable or a general discharge, if warranted.

4. The Manual for Courts-Martial, in effect at the time, showed a punitive discharge was an available maximum punishment for violations of Article 86 (AWOL for more than 30 days).

5. AR 600-200 (Enlisted Personnel Management System), in effect at the time, stated in paragraph 7-64c (Reasons for Reduction – Approved for Discharge from Service with an Undesirable Discharge) that Soldiers approved for administrative separation with an undesirable discharge under other than honorable conditions were to be reduced to private/E-1 prior to discharge.

6. AR 601-280 (Army Reenlistment Program), in effect at the time, stated:

a. Paragraph 2-23 (Nonwaivable Disqualifications) stated persons so discharged under the provisions of chapter 10, AR 635-200 incurred a nonwaivable disqualification.

b. Appendix D (Reenlistment Eligibility (RE) Codes for Reenlistment in the Regular Army) showed the following:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for immediate reenlistment unless waiver consideration is permissible and is granted
- RE-4 – Not eligible for reenlistment. Nonwaivable disqualification

7. AR 635-5-1 (SPD), in effect at the time, stated Soldiers separated per chapter 10, AR 635-200, received an SPD of "KFS." The associated reason for separation was, "Conduct Triable by Court-Martial."

8. AR 15-185 (ABCMR), currently in effect, states:

a. The ABCMR decides cases on the evidence of record; it is not an investigative body. Additionally, 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).

b. 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.

9. AR 640-10 (Individual Military Personnel Records), in effect at the time, stated case files pertaining to separations under other than honorable conditions were to be permanently filed in the Soldier's military personnel records jacket.

10. 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 applicant's service.

11. 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.

12. 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.

//NOTHING FOLLOWS//