

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230010457

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general) or honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Character reference letters (2)
- In-service documents

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 he suffered a major fall off a 90 foot pole during training and hit his head. He probably suffered a concussion as a result affecting his mental health. He consequently went absent without leave (AWOL) and was administratively discharged. As early as April 1978, he was seeking mental health treatment. He was never afforded proper healthcare after the fall and has suffered mental health and cognitive issues ever since, which have plagued the rest of his life.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD), and other mental health issues are related to his request.
4. The applicant enlisted in the New York, Army National Guard (ARNG) on 18 August 1976 and entered initial active duty for training on 12 January 1977.
5. On 17 March 1977, the applicant was admitted to the Fort Jackson, SC, Army hospital and treated for multiple foreign bodies in both hands. The attending physician notes he had slipped from a telephone pole, resulting in multiple splinters being imbedded in his hand. Injury was considered to have been incurred in the line of duty.

6. The applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for wrongfully having in his possession a ration card that belonged to another Soldier, on or about 18 May 1977. His punishment included forfeiture of \$75.00 for one month, and seven days extra duty.
7. The applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 2 July 1977. His punishment included forfeiture of \$50.00 for one month.
8. The applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 3 July 1977, and on or about 6 July 1977. His punishment included forfeiture of \$85.00 for one month and 14 days extra duty.
9. On 13 August 1977, the applicant was reported as AWOL and remained absent until he surrendered to military authorities on 15 August 1977.
10. On 20 August 1977, the applicant was reported AWOL a second time, until he surrendered to military authorities on 22 August 1977.
11. On 23 August 1977, the applicant was reported AWOL a third time, until he returned to military authorities on 29 August 1977.
12. On 1 September 1977, the applicant was reported AWOL a fourth time, until his apprehension by civilian authorities on 15 September 1977. He was processed and released to military authorities.
13. On 16 September 1977, the applicant escaped a correctional custody facility (CCF) and was reported AWOL a fifth time, until his apprehension by civilian authorities on 4 October 1977. He was processed and released to military authorities.
14. Court-martial charges were preferred against the applicant on 6 October 1977, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with five specifications of going AWOL; one specification of disobeying a lawful command from his superior commissioned officer; and one specification of escaping a CCF.
15. The applicant consulted with legal counsel on 1 November 1977, and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of an undesirable discharge; and the procedures and rights that were available to him.
  - a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations –

Enlisted Personnel), Chapter 10, for the good of the service – in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He submitted a statement in his own behalf, stating he was having marital problems and wanted a good discharge so he could get a good job to support his family.

16. On 8 November 1977, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

17. On 10 November 1977, the applicant's commander recommended disapproval of the applicant's request for discharge. Commander noted the applicant's record of numerous AWOL, his disobedience of an order issued by a commissioned officer, and his escape from Correctional Custody were, in his opinion, serious offenses which merit disposition that a court-martial may direct.

18. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial, and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate).

19. The applicant was discharged and returned to the control of the ARNG, on 22 November 1977. His DD Form 214 (Report of Separation from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for administrative discharge – triable by a court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC with Separation Program Designator Code JFS. He completed 8 months and 29 days of net active service this period with 41 days of lost time.

20. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 14 June 1982, the Board voted to deny relief and determined the applicant's discharge was both proper and equitable.

21. The applicant provides two character reference letters detailing the changes in his behavior and mental health following his discharge from the Army. These letters are provided in their entirety for the Board's review within the supporting documents.

22. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

23. In reaching its determination, the Board can consider the applicant's petition, his arguments and assertions, and his service record in accordance with the published equity, injustice, or clemency guidance.

24. 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 including PTSD and a traumatic brain injury (TBI) 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 New York, Army National Guard (ARNG) on 18 August 1976 and entered initial active duty for training on 12 January 1977; 2) The applicant accepted non-judicial punishment (NJP) for having in his possession a ration card that belonged to another Soldier on 18 May 1977; 3) The applicant accepted two NJPs for failing to go at the times prescribed to his appointed place of duty during July 1977; 4) Court-martial charges were preferred against the applicant on 6 October 1977: for five specifications of going AWOL; one specification of disobeying a lawful command from his superior commissioned officer; and one specification of escaping a CCF; 5) The applicant was discharged on 22 November 1977, Chapter 10- triable by a court-martial. His service was characterized as UOTHC. He completed 8 months and 29 days of net active service this period with 41 days of lost time.

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) and hardcopy medical documentation provided by the applicant were also examined.

d. The applicant noted mental health conditions, including PTSD and TBI as a contributing and mitigating factors in the circumstances that resulted in his separation. There is evidence the applicant was involved in an accident where he fell from a pole on 17 March 1977. He was treated for injuries on his hands, but there was insufficient evidence he experienced or reported a head injury. On 8 November 1977, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. The applicant submitted a statement on his on behalf during his separation proceedings, and he

stated he was experiencing marital problems and wanted a good discharge so he could get a good job to support his family. There is insufficient evidence the applicant reported any mental health symptoms including PTSD while on active service.

e. 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. The applicant provided medical documentation from 1978 that he underwent "hypnosis treatment for nerves." This information was in Spanish, and it was translated to English. There was insufficient evidence provided on the applicant's diagnosis at that time or the onset of his potential behavioral health symptoms.

f. 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.

#### Kurta Questions:

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

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing mental health conditions including PTSD and a TBI, while on active service, which mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing mental health conditions including PTSD and a TBI, while on active service. The applicant did engage in various type of misconduct such as repeatedly going AWOL, not being to his appointed place of duty, taking another Soldier's ration card, escaping the CCF, and disobeying an order which can be a sequela to some mental health conditions, including PTSD or at TBI but this is not sufficient to establish a history of a condition during active service. 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 Board considered the applicant's statement and record of service, the frequency and

nature of the applicant's misconduct and the reason for separation. 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 reviewing medical official. The Board concurred with the medical official's 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

:	:	:	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. Section 1556 of Title 10, U.S. Code, 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 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
  - 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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.
4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members

administratively discharged UOTHC 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury, 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 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//