

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 May 2024

DOCKET NUMBER: AR20230010750

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

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- DD Form 214 (Armed Forces of the U.S. Report of Transfer or Discharge)

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 AR2004106979 on 1 February 2005.
2. The applicant states his father and brother were Veterans of foreign wars. When America called him for the military, he answered without hesitation. He asserts disparity and inequality compared to others in the same class, impacted the characterization of his discharge. He answered when called to duty. His service to this country and pledge to sacrifice his life in the line of duty, entitles him to a discharge upgrade. This will make him eligible for certain benefits and opportunities.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) issues are related to his request.
4. On 23 June 1969, the applicant was inducted into the Army of the United States. His record shows he was not awarded a military occupational specialty.
5. On 3 September 1969, the applicant was reported as absent without leave (AWOL), and remained absent until he returned to military authorities on 10 October 1969.
6. Before a special court-martial on 14 November 1969, at Fort Sam Houston, TX, the applicant was found guilty of one specification of going AWOL from on or about 3 September 1969 until on or about 10 October 1969. The court sentenced the

applicant to confinement at hard labor for one month, and forfeiture of \$30.00 per month for five months. The sentence was approved on 26 November 1969.

7. On 2 January 1970, the applicant was reported AWOL a second time, and remained absent until he returned to military authorities on 7 August 1970.

8. Before a special court-martial on 18 August 1970, at Fort Hood, TX, the applicant was found guilty of one specification of going AWOL from on or about 2 January 1970 until on or about 7 August 1970. The court sentenced the applicant to confinement at hard labor for three months. The sentence was approved on 27 August 1970.

9. On 23 September 1970, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

10. On 8 January 1971, the applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice for failing to go at the time prescribed to his appointed place of duty. His punishment included forfeiture of \$20.00 for one month.

11. On 11 January 1971, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. However, he was diagnosed with antisocial personality, chronic, moderate; manifested by impulsive and manipulative tendencies.

12. A Federal Bureau of Investigation report shows the applicant, while AWOL had been arrested and charged with auto theft and carrying a pistol on 13 February 1970. Additionally, the report shows he was also charged with murder on 16 February 1971.

13. Before a civilian court on 8 September 1971, in Richland County, SC, the applicant was found guilty of murder. The court sentenced him to imprisonment for life.

14. On 21 September 1971, the applicant's unit notified him that as a result of his conviction and confinement, he may be discharged and issued a General or an Undesirable Discharge Certificate.

15. On 1 October 1971, the applicant acknowledged he had been informed of the contemplated separation action. He requested representation by counsel before a board of officers. He requested representation by counsel.

16. On 14 October 1971, the applicant's unit commander formally recommended his separation from service under the provisions of Army Regulation 635-206 (Personnel Separations – Discharge – Misconduct (Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion)), for civil conviction.

17. On 10 December 1971, a board of officers convened to determine if the applicant should be eliminated from service. After careful consideration of the evidence before it, the Board found that the applicant was not qualified for further retention in the service, due to his conviction by civil authorities. The Board recommended his elimination from the service.

18. Consistent with the board's findings and recommendations, the separation authority approved the applicant's separation, and directed issuance of a DD Form 258A (Undesirable Discharge Certificate).

19. The applicant was discharged on 11 January 1972. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-206, with Separation Program Number 284 (Misconduct) and Reentry Code 4. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 8 months and 24 days of net active service this period with 695 days of lost time.

20. The applicant petitioned the Army Discharge Review Board on two occasions requesting upgrade of his UOTHC discharge. Both times, the Board voted to deny relief and determined he was properly discharged.

21. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 1 February 2005, the Board voted to deny relief and determined the overall merits of the case were insufficient as a basis for correction of his records.

22. On 12 December 2023, the ABCMR staff requested that the applicant provide medical documents to support his issue of PTSD. He was advised that he could contact the doctor that diagnosed him or his Veterans Affairs regional office for assistance. He responded with a self-authored letter, stating he is financially unable to pay for medical records. He affirms there is mental scarring from his inception at basic training. He was racially attacked, harassed by a noncommissioned officer and told that he would be sent to Vietnam with a one-way ticket because of his arrogance. This letter is provided in its entirety for the Board's review within the supporting documents.

23. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and 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 experienced PTSD that mitigates 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 was inducted on 23 June 1969 into the Army; 2) Before a special court-martial on 14 November 1969, the applicant was found guilty of going AWOL from 3 September-10 October 1969; 3) Before a special court-martial on 18 August 1970, the applicant was found guilty of going AWOL from 2 January-7 August 1970; 4) A Federal Bureau of Investigation report shows the applicant, while AWOL had been arrested and charged with auto theft and carrying a pistol on 13 February 1970. Additionally, the report shows he was also charged with murder on 16 February 1971. Before a civilian court on 8 September 1971, the applicant was found guilty of murder; 5) The applicant was discharged on 11 January 1972 for civil conviction. His service was characterized as UOTHC.

b. 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) was also examined. No additional medical documentation was provided for review.

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant ever reported or was diagnosed with PTSD while on active service. He underwent two mental status exams as part of his separation proceedings, on 23 September 1970 and on 11 January 1971. He was not diagnosed with a mental health condition other than antisocial personality, and he was psychiatrically cleared for separation.

d. A review of JLV was void of medical information. The applicant has not 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 Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced PTSD which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct 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 PTSD while on active service. In addition, there is no nexus between PTSD and the applicant's conviction of murder in that: 1) this type of misconduct is not a part of the natural history

or sequelae of PTSD; 2) PTSD does not affect one’s ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends PTSD resulted in his misconduct, and per the Liberal Consideration Policy, his contention is sufficient for 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 not 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 concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. The Board found insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. In addition, there is no nexus between PTSD and the applicant’s conviction of murder.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of murder in the 8 months and 24 days of net active service this period of which 695 days was lost time. The Board noted the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a general under honorable conditions discharge. Therefore, the Board denied relief.

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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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. 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.

2. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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.

4. Army Regulation 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct. Section VI, (Conviction by Civil Court) of this regulation prescribes the standards and procedures for processing cases of individuals who, during their current term of active military service, have been initially convicted or adjudged juvenile offenders by a domestic court of the U.S. or its territorial possessions, or convicted by a foreign tribunal. If discharge is desired and the individual is not physically in the custody of the civil authorities, a recommendation for discharge may be submitted to Headquarters, Department of the Army. It provided that an undesirable discharge was normally considered appropriate for members separated under this regulation.

5. 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.

6. 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.

7. 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//