

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011012

APPLICANT REQUESTS: Reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge.

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

- DD Form 293 (Application for the Review of Discharge)
- Service Medical Documents (two duplicate)

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 AR20130014490 on 6 May 2014.
2. The applicant states he needs to upgrade his discharge characterization so that he may receive compensation for the injury that he sustained while on active duty. He provides a military service document that shows an injury to lower back, dated 15 June 1970, when the applicant fell from a pole. He lists post-traumatic stress disorder (PTSD) as related to his request.
3. The applicant was inducted into the Army of the United States on 17 October 1969. His military occupational specialty was 36C (Lineman).
4. Before a special court martial on 28 May 1970, the applicant was found guilty of being absent without leave (AWOL) from on or about 20 April 1970 until on or about 27 April 1970. The court sentenced him to be reduced to private/E-1. The sentence was approved on 4 June 1970 and ordered to be duly executed.
5. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on 12 October 1970, for without authority, failing to go at the time prescribed to his appointed place of duty on or about 12 October 1970. His punishment consisted of forfeiture of \$15.00 per month for one month and extra duty.

6. The applicant was counseled on 3 November 1970 and 16 November 1970 for failure to report to duty and being AWOL.

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

- 3 November 1970, for without authority, failing to go at the time prescribed to his appointed place of duty on or about 2 November 1970 and on or about 3 November 1970; his punishment consisted of extra duty and restriction
- 16 November 1970, failing to go at the time prescribed to his appointed place of duty on or about 14 November 1970 and on or about 16 November 1970 (twice); his punishment consisted of forfeiture of \$20.00 per month for one month

8. A neuropsychiatric evaluation on 24 November 1970 shows the applicant had a history of faulty judgement, noncommitment to productive goals, an incapacity to respond to rehabilitative efforts, resentment towards authority and a tendency to go AWOL. There were no disqualifying mental or physical defects sufficient to warrant disposition through medical channels. He did not manifest a psychosis or neurosis. It was believed he would not adjust to military service and further rehabilitative efforts will be nonproductive. He was mentally responsible, able to distinguish right from wrong and to adhere to the right and had the mental capacity to understand and participate in board proceedings.

9. The applicant's medical condition had changed due to back pain since his physical examination on 16 December 1970.

10. Statements from members of the applicant's unit show he handled a chrome plated .22 caliber pistol in the barracks. He once held the pistol to another Soldier's head. The applicant had the loaded gun in his locker in the barracks. Someone witnessed him firing the weapon out the barracks window into the company area. The commander searched the locker and found a loaded .22 caliber revolver in an AWOL bag in the applicant's locker.

11. The applicant's commander recommended he be separated under the provisions of Army Regulation (AR) 635-212 (Personnel Separations-Discharge, Unfitness and Unsuitability) for unfitness due to involvement in frequent incidents of a discreditable nature with civil or military authorities. His commander cited since the applicant's assignment to the unit the applicant had been a constant disciplinary problem, with great disregard for military authority and discipline. He requires constant supervision for even the simplest tasks, with a group or individually. He grows less responsible despite frequent counseling by the commander and the first sergeant. He feels the applicant can never become a productive Soldier.

12. The applicant consulted with legal counsel on 21 January 1971 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 (UOTHC); and the procedures and rights that were available to him.

a. The applicant acknowledged; he might expect to encounter substantial prejudice in civilian life in the event a under honorable conditions (general) discharge was issued to him. He further acknowledged that, as a result of the issuance of an undesirable discharge (UOTHC), he might be ineligible for many or all benefits as a veteran under could both Federal and State law.

b. He elected not to submit statements in his own behalf.

13. The applicant's chain of command requested requirements be waived and the applicant be issued an Undesirable Discharge Certificate under the provisions of AR 635-212.

14. The separation authority approved the request for discharge on 10 February 1971 and directed the issuance of an DD Form 258A (Undesirable Discharge Certificate).

15. The applicant was discharged on 19 February 1971. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of AR 635-212 with Separation Program Number (SPN) 28B (unfitness) and Reenlistment Code 3 and 3B. His service was characterized as UOTHC. He completed 1 year, 3 months, and 26 days of net active service, with 7 days of lost time. His awards include the National Defense Service Medal.

16. Regulatory guidance provides that an individual is subject to separation when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier further effort is unlikely to succeed.

17. The applicant provides his service military documents as discussed above.

18. On 19 November 1971, the Army Discharge Review Board determined the applicant was properly discharged and denied his request for an upgrade of his discharge.

19. On 6 May 2016, the ABCMR determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case were insufficient as a basis for correction of the applicant's records.

20. In reference to his Veterans Administration (VA) health benefits, decisions of the VA are solely within the jurisdiction of that agency. While the ABCMR can correct errors in an individual's military records it has no authority to direct or influence decisions by other agencies

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

22. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC). He contends he experienced PTSD that mitigates 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:

- The applicant was inducted into the Army on 17 October 1969.
- The applicant accepted NJP for three Article 15s associated with failing to be at his appointed place of duty, and he was witnessed to have fired a weapon out the barracks window. His commander found a .22 caliber revolver in an AWOL bag in the applicant's locker. He was discharged under the provisions of AR 635-212 with Separation Program Number (SPN) 28B (unfitness) and Reenlistment Code 3 and 3B. His service was characterized as UOTHC.
- The applicant was discharged on 19 February 1971, and he completed 1 year, 3 months, and 26 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he has PTSD related to injury sustained while in service. A Mental Hygiene Consultation Service document dated 24 November 1970 was reviewed and indicated that the applicant had faulty judgment, noncommitment to productive goals, and an incapacity to respond to rehabilitative efforts. It stated, "there are no disqualifying mental or physical defects sufficient to warrant disposition through medical channels" and that the applicant had mental capacity to understand and participate in board proceedings. Medical records from the applicant's time in service were reviewed, and there was no indication of a physical or mental traumatic event. There was insufficient evidence that the applicant was diagnosed with PTSD while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 had an undiagnosed PTSD at the time of the misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition, including PTSD, while on active service. However, the applicant contends he had PTSD, or an experience that mitigated 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 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 the medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. The opine noted insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition, including PTSD, while on active service.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of holding a pistol to another Soldiers head as well as firing a weapon out of the barracks window, potentially causing harm or injury to someone. The Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year, 3 months, and 26 days of net active service, with 7 days of lost time. 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. Therefore, relief was denied.

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 Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20130014490 on 6 May 2014.

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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 1556, 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.
2. AR 635-212 (Personnel Separations-Discharge Unfitness and Unsuitability), then in effect, provided the policy and procedures for administrative separation of enlisted

personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

a. Paragraph 6a (1) of the regulation provided, in pertinent part, that members involved in frequent incidents of a discreditable nature with civil or military authorities were subject to separation for unfitness. An undesirable discharge was normally considered appropriate.

b. Paragraph 1-9f (Issuance of an undesirable discharge) states an undesirable discharge is an administrative separation from the service under conditions other than honorable.

c. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

d. Paragraph 3-7b (General Discharge) states a general discharge is a separation from the Army under honorable conditions.

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 Service 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; 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 (Personnel and Readiness) issued guidance to Service DRBs and Service 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//