

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011060

APPLICANT REQUESTS:

- an upgrade of his discharge under other than honorable conditions (UOTHC)
- the narrative reason for his separation be changed from "Convicted by a Civil Court During Current Term of Active Military Service" to an unspecified, presumably more favorable reason

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

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 that at the time of his discharge he was stationed in Germany and was given a medical furlough to the U.S. to see his mother who was very sick. When he arrived, his mother told him about how some guy had brutally beaten his ex-girlfriend nearly to death. He lost his mind and killed the man who did these terrible things to his ex-girlfriend. To this day, he regrets what he did and has paid a big price for his actions. The applicant indicated on his application that post-traumatic stress disorder (PTSD), other mental health conditions, and intimate partner violence/domestic violence are related to his request.
3. The applicant enlisted in the Regular Army for a period of 2 years in the rank/grade of private (PV1)/E-1 on 4 October 1971. He was advanced to private (PV2)/E-2 on 4 February 1972 and that was the highest rank he held while serving. Upon completion of initial entry training, he was assigned to a unit in Germany.

4. On 9 June 1972, the applicant accepted non-judicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, without authority, absenting himself from his place of duty for approximately 14 hours on or about 5 June 1972. His punishment included reduction to private (PV1)/E-1, suspended for 90 days; forfeiture of \$60.00; 14 days of restriction; and 14 days of extra duty.
5. The applicant's immediate commander rendered a Report of Inquiry wherein he stated, on 17 July 1972, the applicant departed his unit on leave for the purpose of visiting his mother who was having personal difficulties at the time. On 15 August 1972, he was granted a 7 day extension on his leave in order to apply for a compassionate reassignment, however, he failed to return at the time prescribed and was designated absent without leave (AWOL). He was dropped from the rolls and designated as a deserter effective 22 September 1972.
6. On 27 July 1972, the suspended portion of the punishment imposed on 9 June 1972 was vacated and the applicant was reduced to PV1/E-1 effective 9 June 1972.
7. A DA Form 2800 (Criminal Investigation Division (CID) Report of Investigation) shows the applicant was arrested on 2 October 1972 and charged with Aggravated Battery following him shooting a woman with a .25 caliber pistol. As a result, the woman was paralyzed from her waist down and was in critical condition in a hospital. The applicant was confined in the Cook County Jail, Chicago, IL at the time.
8. The applicant was returned to military control effective 16 April 1973.
9. The applicant was tried and convicted in a civil court for Aggravated Battery and sentenced to confinement for 10 years. He was also convicted for Murder and sentenced to confinement for 14 years. The sentences were to be served concurrently.
10. On 8 November 1973, the applicant's immediate commander informed him that he was initiating action to separate the applicant from service under the provisions of Army Regulation 635-206 (Discharge: Misconduct (Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion), Section VI, for conviction by civil court. The commander advised the applicant that he could be furnished an Undesirable Discharge Certificate as a result of this action. He further advised the applicant of his various rights.
11. On 8 November 1973, the applicant acknowledged receipt of the commander's intent and indicated he had been counseled and advised of the basis for the action to be taken against him under the provisions of Army Regulation 635-206. He requested consideration of his case by a board of officers and representation by counsel but declined his right to submit statements in his own behalf.

12. An Administrative Elimination Board was conducted to consider the applicant's case. The board found the applicant should be eliminated from the service under the provisions of Army Regulation 635-206 due to misconduct (conviction by civil court) with issuance of an Undesirable Discharge Certificate.

13. On 20 March 1974, the separation authority approved the Board's findings and recommendation.

14. The applicant's DD Form 214 (Report of Separation from Active Duty) shows the applicant was discharged on 27 March 1973, under the provisions of Army Regulation 635-206, with Separation Program Designator code "284" (Indicating by reason of "Convicted by a Civil Court During Current Term of Active Military Service") and Reenlistment code "RE-4." His service was characterized as UOTHC. He was credited with completion of 10 months, and 14 days of net service this period, with 581 days of time lost due to AWOL and confinement.

15. 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.

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of a change to the narrative reason for his under other than honorable conditions (UOTHC). He contends he experienced an undiagnosed mental health condition, including PTSD, and intimate partner violence/domestic violence (IPV/DV) as related to 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 enlisted into the Regular Army on 4 October 1971.
- He experienced two episodes of AWOL, and in September 1973 the applicant was convicted in a civil court for Murder and sentenced to confinement for 14 years. He was also convicted of Aggravated Battery and sentenced to confinement for 10 years.
- The applicant was discharged on 27 March 1973, and he was credited with 10 months and 14 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 that the murder conviction was related to a domestic violence incident between the victim and the applicant's ex-girlfriend. Medical records provided did not indicate any history of mental health conditions. There was insufficient evidence that the

applicant was diagnosed with PTSD or another psychiatric condition 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 mental health condition, including PTSD, at the time of the misconduct. He also asserts that his misconduct was related to IPV/DV.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition, including PTSD, while on active service. However, no records related to any mental health conditions were provided or found. Additionally, there was no evidence of the applicant being a victim of intimate partner or domestic violence.

(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. Additionally, there is no nexus between his asserted mental health condition, including PTSD, and his misconduct related to murder and aggravated assault: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition 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 advisory 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 no nexus between his asserted mental health condition, including PTSD, and his misconduct related to murder and aggravated assault:

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the egregious misconduct of murder and aggravated assault. The found insufficient evidence beyond self-report, that the applicant was experiencing a mental health condition, including PTSD, while on active service. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Based on the preponderance of evidence the Board determined that the narrative reason for separation was not in error or unjust. Furthermore, the Board agreed 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. Therefore, the Board denied relief.

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.

[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. 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. Title 10, USC, 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.
3. Army Regulation 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 that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.

4. Army Regulation 635-206, in effect at that time, set forth the basic authority for the separation of enlisted personnel due to misconduct (fraudulent entry, conviction by civil court, and absence without leave or desertion).

a. Section IV provided members would be considered for discharge when it was determined that one or more of the following applied: (a) when the Soldier was initially convicted by civil authorities, or action taken against the Soldier which was tantamount to a finding of guilty, of an offense for which the maximum penalty under the Uniform Code of Military Justice was death or confinement in excess of 6 months; (b) when initially convicted by civil authorities of an offense which involved moral turpitude, regardless of the sentence received or maximum punishment permissible under any code; or (c) when initially adjudged a juvenile offender for an offense involving moral turpitude. An undesirable discharge was normally considered appropriate. For discharge of members of Reserve components see section VII.

b. Section VII provided that the administrative discharge of a member of the Reserve components for cause, under conditions other than honorable, may be effected only pursuant to the approved findings of a board of officers convened by competent authority, except in those instances wherein the individual concerned consents to such discharge with waiver of board proceedings. If discharge under these regulations is contemplated, an effort will be made to obtain the written consent of the reservist for waiver of board action, prior to complying with paragraph 34 (Appointment of Board of Officers), except in those cases where the individual is not under military control. A board of officers will not be convened in any case wherein such written consent is obtained.

c. Upon determination a Soldier is to be discharged from the service as undesirable under these regulations, the authority accomplishing the discharge will, if the Soldier concerned is in a grade above private/E-1, reduce such Soldier to that grade without further administrative procedure and discharge the Soldier as an E-1.

5. Army Regulation 635-200 (Active Duty Enlisted Separations), currently in effect, sets forth the basic authority for the separation of enlisted personnel. It states in a case in which a discharge UOTHC is authorized by regulation, a member may be awarded an honorable or general discharge, if during the current enlistment period of obligated service, he has been awarded a personal decoration or if warranted by the particular circumstances of a specific case.

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. A discharge UOTHC is an administrative separation from the Service under conditions other than honorable.

6. 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 post-traumatic stress disorder (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.

7. 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.

8. 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//