

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230011474

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) character of service and an appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 5 October 1983
- Request for Information, Department of Veterans Affairs (VA), dated 19 September 1985
- Newspaper article and obituary (illegible)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 tried to kill himself and his family was falling apart. His brother killed the man who raped and beat his sister to death, and his father died of a heart attack. The applicant fell apart and had a nervous breakdown. Drugs, liquor, cocaine, and weed were all in his system when he signed "all the papers." He did not get to see a doctor either. The applicant notes post-traumatic stress disorder (PTSD) and other mental health issues as conditions related to his request.
3. The applicant enlisted in the Regular Army on 31 August 1979 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 94B (Food Service Specialist). The highest rank he attained was specialist fourth class/E-4.
4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on 18 March 1980, for two occasions of

failing to obey a lawful order from his superior noncommissioned officer (NCO), on or about 7 March 1980. His punishment consisted of forfeiture of \$100.00 pay and correctional custody at the Correctional Custody Facility (CCF) for 30 days.

5. The applicant reenlisted on 30 August 1980 for a 3-year period.

6. Three DA Forms 4187 (Personnel Action) show the applicant was reported absent without leave (AWOL) on 4 September 1980 and was subsequently dropped from the rolls on 6 October 1980. He returned to duty on 21 October 1980.

7. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ, on 30 October 1980, for being AWOL, from on or about 4 September 1980 until on or about 21 October 1980. His punishment consisted of reduction to private/E-2, forfeiture of \$200.00 pay per month for two months, and correctional custody at the CCF for 30 days.

8. On 4 March 1981, the applicant's chain of command requested a waiver of fraudulent entry and retention for the applicant. It was determined that at the time of his enlistment, the applicant concealed a civil conviction of larceny and two civil convictions of forcible assault, which would have disqualified him for enlistment. The court-martial convening authority approved the waiver on 10 March 1981.

9. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on four additional occasions:

a. On 14 June 1982, for failing to go at the time prescribed to his appointed place of duty, on or about 6 June 1982. His punishment consisted of forfeiture of \$100.00 pay, suspended for 60 days; 14 days of extra duty; and 14 days of restriction.

b. On 21 October 1992, for failure to obey a written regulation and the wrongful possession and use of marijuana, on or about 2 October 1982. His punishment consisted of forfeiture of \$365.00 pay per month for two months, reduction to private first class (PFC)/E-3, 45 days of extra duty, and 45 days of restriction. Upon appeal, the punishment which provided for forfeiture in excess of \$357.00 pay per month was set aside.

c. On 26 April 1983, for failing to go at the time prescribed to his appointed place of duty, on or about 16 April 1983. His punishment consisted of forfeiture of \$166.00 pay and 14 days of extra duty.

d. On 4 August 1983, for failing to go at the time prescribed to his appointed place of duty, on or about 25 June 1983. His punishment consisted of reduction to PFC/E-3 and two days of extra duty. The applicant's appeal of his punishment was denied.

10. On 31 August 1983, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-3, by reason of frequent incidents of a discreditable nature with military authorities.

11. On that same date, the commander formally recommended the applicant's separation from service, prior to the expiration of his term of service, under the provisions of AR 635-200, Chapter 14, for patterns of misconduct. As specific reasons for the request, the commander noted the applicant was court-martialed on 22 August 1983 for assaulting an officer, resisting arrest, being drunk and disorderly, and two counts of destruction and damage to military property. The commander further noted six occasions of nonjudicial punishment and the concealment of civil convictions prior to enlistment. The command was required to spend an inordinate amount of time dealing with him, to no avail; he showed no indication of improvement. [The aforementioned court-martial proceedings are not available for review in the applicant's service record.]

12. The applicant consulted with counsel on 2 September 1983. He was advised of the basis for the contemplated separation action, the rights available to him, and the effect of a waiver of his rights. He waived consideration of his case by an administrative separation board and a personal appearance before the board. He elected not to submit statements in his own behalf.

13. The applicant underwent a pre-separation medical examination on 12 September 1983. The examining provider determined the applicant was medically qualified for discharge.

14. On 13 September 1983, the applicant underwent a mental status evaluation. The evaluating provider noted there was no impression of mental illness. The applicant was mentally responsible, able to distinguish right from wrong, and had the capacity to understand and participate in board proceedings.

15. The intermediate commanders reviewed and concurred with the recommended separation action, further recommending the issuance of a UOTHC discharge.

16. On 3 October 1983, the separation authority approved the recommended separation action and further directed the issuance of a DD Form 794A (UOTHC Discharge Certificate).

17. The applicant was discharged on 5 October 1983, under the provisions of AR 635-200, Chapter 14, with a UOTHC character of service. His DD Form 214 contains the following entries:

- Item 12c (Net Active Service This Period) – 03 11 18 (indicating 3 years, 11 months, and 18 days)
- Item 25 (Separation Authority) – Paragraph 14-12c, AR 635-200
- Item 28 (Narrative Reason for Separation) – Misconduct-Commission of a Serious Offense
- Item 29 (Dates of Lost Time During This Period) – 800904-801020 (indicating from 4 September 1980 to 20 October 1980)

18. The Army Discharge Review Board (ADRB) considered the applicant's request for an upgrade of his character of service, on or about 15 January 1985. After careful consideration, the Board determined the applicant's characterization of service was both proper and equitable. However, during the review process, the Board discovered discrepancies between his records and his original discharge documents. The applicant was issued a DD Form 215 (Correction to DD Form 215) which shows the following corrections:

- Item 12c (Net Active Service This Period) – 04 01 05
- Item 25 (Separation Authority) – Paragraph 14-12b, AR 635-200
- Item 26 (Separation Code) – JKM
- Item 28 (Narrative Reason for Separation) – Misconduct-Pattern of Misconduct
- Item 29 (Dates of Lost Time During This Period) – delete: 800904 - 801020
- Item 29 – add: 78 Days Lost Under Title 10, USC, 972: 4 Sep 1980-20 Oct 1980, 23 Aug 83-21 Sep 83

19. The applicant provides a copy of an RFI from the VA, dated 19 September 1985, requesting the facts and circumstances of his separation. A copy of a newspaper article entitled "Picnic Slaying Nets Life Term" and an obituary are illegible.

20. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

21. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

22. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) character of service. He contends PTSD and other mental health conditions mitigate his discharge.

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 31 August 1979 and reenlisted on 30 August 1980.
- Applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on 18 March 1980, for two occasions of failing to obey a lawful order from his superior noncommissioned officer (NCO), on or about 7 March 1980.
- Three DA Forms 4187 (Personnel Action) show the applicant was reported absent without leave (AWOL) on 4 September 1980 and was subsequently dropped from the rolls on 6 October 1980. He returned to duty on 21 October 1980.
- On 4 March 1981, the applicant's chain of command requested a waiver of fraudulent entry and retention for the applicant. It was determined that at the time of his enlistment, the applicant concealed a civil conviction of larceny and two civil convictions of forcible assault, which would have disqualified him for enlistment. The court-martial convening authority approved the waiver on 10 March 1981.
- Applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on four additional occasions between 14 June 1982 to 4 August 1983.
- On 31 August 1983, the applicant's immediate commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-3, by reason of frequent incidents of a discreditable nature with military authorities.
- On that same date, the commander formally recommended the applicant's separation from service, prior to the expiration of his term of service, under the provisions of AR 635-200, Chapter 14, for patterns of misconduct. As specific reasons for the request, the commander noted the applicant was court-martialed on 22 August 1983 for assaulting an officer, resisting arrest, being drunk and disorderly, and two counts of destruction and damage to military property. The commander further noted six occasions of nonjudicial punishment and the concealment of civil convictions prior to enlistment. The command was required to spend an inordinate amount of time dealing with him, to no avail; he showed no indication of improvement.
- Applicant was discharged on 5 October 1983, under the provisions of AR 635-200, Chapter 14, with a UOTHC character of service.
- The Army Discharge Review Board (ADRB) considered the applicant's request for an upgrade of his character of service, on or about 15 January 1985. After careful consideration, the Board determined the applicant's characterization of service was both proper and equitable.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, he tried to kill himself and his family was falling apart. His brother killed the man who raped and beat his sister to death, and his father died of a heart attack. The applicant fell apart and had a nervous breakdown. Drugs, liquor, cocaine, and weed were all in his system when he signed "all the papers." He did not get to see a doctor either. The applicant notes post-traumatic stress disorder (PTSD) and other mental health issues as conditions related to his request. Contrary to the applicant's assertion, he underwent a pre-separation medical examination on 12 September 1983. The examining provider determined the applicant was medically qualified for discharge. In addition, on 13 September 1983, the applicant underwent a mental status evaluation. The evaluating provider noted there was no significant mental illness, the applicant was mentally responsible, able to distinguish right from wrong, and had the capacity to understand and participate in board proceedings.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. The applicant initially sought services via the VA in 2008. A note dated 18 December 2008; indicates he participated in the "Incarcerated Veteran's Group meeting at the Omaha Correctional Facility". He then contacted the VA in February 2015, but was ineligible for services. The applicant established services in April 2023 via the VA's homeless hotline, and the record indicates a history of incarceration, polysubstance abuse, and homelessness. Contrary to the applicant's report of his sister's murder, an in-depth biopsychosocial assessment dated 23 August 2023 indicates he has seven siblings, four sisters and three brothers, and reports the ages of each of his siblings. The assessment notes the applicant has been homeless for several years and has a history of legal involvement, obtaining his GED and completing substance use treatment while incarcerated. During the assessment, the applicant declined behavioral health services. The applicant has participated in supportive social work and case management services related to his issues of homelessness and financial stressors. The record does not evidence any behavioral health diagnosis or treatment.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service. However, it is unlikely any BH condition would mitigate his discharge.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts mitigating conditions, PTSD and OMH.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service or after discharge.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for PTSD or any other mental health condition. And while the applicant self-asserted PTSD and OMH, he did not provide any medical documentation substantiating any BH diagnosis including PTSD or any other mental health condition. Overall, the applicant was discharged due to being court-martialed on 22 August 1983 for assaulting an officer, resisting arrest, being drunk and disorderly, and two counts of destruction and damage to military property. The commander further noted six occasions of nonjudicial punishment and the concealment of civil convictions prior to enlistment. Regardless of diagnosis, PTSD would not mitigate his discharge since assault, destruction of property, and lying to conceal his prior civil convictions, are not part of the natural history or sequelae of PTSD, or any other behavioral health condition. In addition, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined 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.

12/9/2024

X

CHAIRPERSON

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, USC, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

4. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

5. 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 (DRBs) and Boards for Correction of Military/Naval Records (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. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or 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//