

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230012639

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded. Additionally, he requests an appearance before the Board via telephone.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 wants his benefits. He was told it would be an under honorable conditions (general) discharge; but sometime along the way it got changed. He was burnt out. The applicant lists other mental health issue as related to his request.
3. The applicant enlisted in the Regular Army on 29 October 1971 for 2 years. His military occupational specialty was 76A (Supply Clerk).
4. The applicant served in Germany from 25 April 1972 through 18 October 1973.
5. The applicant was counseled on 17 July 1972 for failure to go to work.
6. The applicant received nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on:
 - 22 November 1972, for being disrespectful in language to his noncommissioned officer (NCO) on or about 13 November 1972; his punishment consisted of forfeiture of \$60.00 per month for one month and reduction to private 2/E-2 (suspended) and vacated on 27 November 1972
 - 21 December 1972, for without authority, absenting himself from his palace of duty on or about 15 December 1972 until 15 December 1972 and being

disrespectful in language to his superior NCO on or about 16 December 1972; his punishment consisted of forfeiture of \$67.00 per month for one-month, 14 days extra duty, and 7 days restriction

7. The applicant was counseled on 24 January 1973 for not attending an appointment. The applicant stated he had money problems at home and would not discuss them as "we" could not help him. He feels that the establishment is just trying to break him down and he just wants "out of this place". He feels he is "aware of everything" no matter how he gets out. He wants freedom of self to do as he wants when he wants. The applicant would not sign the statement.
8. The applicant received NJP under Article 15 of the UCMJ on 13 February 1973, for failing to obey a lawful order on or about 8 February 1973. His punishment consisted of forfeiture of \$125.00 per month for two months (one month suspended), and restriction for 30 days, second 15 days (suspended)
9. A Report for Suspension of Favorable Personnel Action Form, dated 12 March 1973, shows the applicant was pending discharge under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), paragraph 13, for unfitness.
10. The applicant's separation packet and the separation authority memorandum are not available for review.
11. The applicant was discharged on 6 April 1973. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of AR 635-200, paragraph 13, for unfitness with Separation Program Number 28B (frequent involvement in incidents of a discreditable nature with civil or military authorities) and Reenlistment Code 4. His service was characterized as UOTHC. He completed 1 year, 5 months and 8 days of net active service. He was awarded the National Defense Service Medal.
12. Regulatory guidance provides for separation due to unfitness under the provisions of Chapter 13 of AR 635-200 for unfitness. Applicable to persons who are best described as having an established pattern for shirking.
13. In reference to his benefits, decisions of the Veterans Administration (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.
14. On 7 April 1977, the Army Discharge Review Board was unable to locate an application for the applicant.

15. On 7 June 2024, in the processing of this case, the U.S. Army Inspector General Agency, searched their database and did not locate any records pertaining to the applicant.

16. 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.

17. 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 Other Mental Health Issues 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 enlisted in the Regular Army on 29 October 1971 as a supply clerk, 2) the applicant was counseled on 17 July 1972 for failure to go to work, 3) the applicant received an Article 15 on 22 November 1972 for being disrespectful in language to his noncommissioned officer (NCO) and on 21 December 1972 for absenting himself from his place of duty on or about 15 December 1972 until 15 December 1972 and being disrespectful to his NCO on or about 16 December 1972, 4) the applicant received another article 15 on 13 February 1973 for failing to obey a lawful order on 08 February 1973, 5) the applicant was discharged on 06 April 1973 under the provisions of Army Regulation (AR) 635-200, Paragraph 13, for unfitness with separation program number 28B (Frequent involvement in incidents of a discreditable nature with civil or military authorities).

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No civilian BH records were available for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. Review of the applicant's enlistment contract dated 29 October 1971 shows a PULHES of 111111. His Report of Medical History on Standard Form (SF) 93 dated 29 September 1971 indicates the applicant denied having depression or excessive worry, trouble sleeping, and/or nervous trouble of any sort. Psychiatric, item 42, on SF 88 dated 20 September 1971 was documented as 'normal' on clinical evaluation and the applicant was determined to be medically qualified for enlistment. In-service medical records were available via SF 600s from 03 November 1971 to 20 February 1973 that pertains to treatment for physical health concerns. There is no BH documentation available for review in the medical records provided by the applicant.

d. A review of JLV was void of medical information. The applicant is not service connected for any BH conditions through the VA. Of note, due to the nature of his discharge the applicant is ineligible for VA services.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition experience actually excuse or mitigate the discharge? No. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation.

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 that the applicant had a condition or experience during his time in service that mitigated his misconduct.

2. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board agreed there is insufficient evidence of in-service mitigating factors to overcome the misconduct of being disrespectful and AWOL. The Board found the applicant's record is absent medical

documentation supporting his assertion of Other Mental Health Issues. Based on the advising opine and the preponderance of evidence, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

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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, 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, 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. 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing 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. 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 13. This chapter establishes policy and provides procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service. Action will be taken to separate an individual for unfitness when it is clearly established that: (1) Despite attempts to rehabilitate or develop him as a satisfactory soldier, further effort is unlikely to succeed; or (2) Rehabilitation is impracticable, or he is not amenable to rehabilitation measures (as indicated by the medical and/or personal history 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 (DRB) and 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 Post-Traumatic Stress Disorder; 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards DRBs and Service (BCM/NRs) on 25 July 2018 [Wilkie Memorandum], 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//