

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230012792

APPLICANT REQUESTS:

- reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 9 October 1981, to change Item 12a (Date Entered AD This Period) from 11 June 1981 to 11 June 1980
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214
- Department of Veterans Affairs (VA) discharge statement, dated 30 September 2015

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 AR20090017366 on 9 April 2010.
2. The applicant requests correction of his DD Form 214, Item 12a, to show the date he entered active duty as 11 June 1980. A DD Form 215 (Correction to DD Form 214) was issued to the applicant on 12 April 1989, reflecting this correction. Therefore, the Board will not consider this portion of the applicant's request.
3. The applicant states, in effect, administrative and punitive action was taken against him for disobeying orders. He did not disobey orders; he could not hear them. His command was aware of his permanent profile for hearing loss. Instead of assisting him, he was harassed for not being able to hear or understand. When he asked if an order or direction could be repeated, his questioning was misconstrued as defiance. Feeling despondent, he went absent without leave (AWOL) for fear of further harassment. He

knows this was not the correct action; however, it should be understandable due to the constant harassment and aggression displayed by his superiors. He had one year of honorable service before the incident.

4. He enlisted in the Regular Army on 11 June 1980, for a 3-year period. He was awarded the military occupational specialty of 13B (Cannon Crewman). The highest grade he attained was private/E-2.

5. His DA Form 2-1 (Personnel Qualification Record) Item 4 (Assignment Considerations) states, "No noise hazardous duty. No duty which regularly or daily exposes the individual to hazardous noise equipment such as generators, mobile compressors, mechanized or combat vehicles, engineering vehicles, or aviation equipment, or to hazardous noise levels produced by weapons fire, blast, or concussion. The individual's hearing must be retested at least annually. Noise is hazardous to this man's health. He must be properly fitted with and use ear protectors in all hazardous noise exposure duties. His hearing should be monitored with at least annual tone threshold examinations."

6. The applicant accepted nonjudicial punishments (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) for the following:

a. On 15 January 1981, for disobeying a lawful order by not assisting his roommates in cleaning their room, and for being disrespectful in language towards his superior noncommissioned officer (NCO) by saying to him "I don't want to hear it", or words to that effect, on or about 13 January 1981. His punishment imposed was forfeiture of \$50.00 pay, 14 days of restriction, and 14 days of extra duty.

b. On 4 March 1981, for disobeying a lawful order by failing to "run powder," on or about 27 February 1981. His punishment imposed was reduction to the grade of E-1, forfeiture of \$50.00 pay, 14 days of restriction, and 14 days of extra duty.

c. On 31 March 1981, for disobeying a lawful command by not maintaining proper interval during a road march, on or about 24 March 1981. His punishment imposed was 45 days of restriction and 45 days of extra duty.

d. On 10 September 1981, for failing to go at the time prescribed to his appointed place of duty, to wit: remedial physical training formation, on or about 5 September 1981. His punishment imposed was reduction to the grade of E-2, forfeiture of \$110.00 pay, 14 days of restriction, and 14 days of extra duty.

7. Summary Court-Martial Order Number 46, issued by Headquarters, 214th Field Artillery Brigade, Fort Sill, OK, issued on 14 September 1981 shows:

a. He was found guilty of one specification of behaving himself with disrespect towards his superior commissioned officer by turning and leaving while the officer was talking to him, one specification of disobeying a lawful command from his superior commissioned officer to retrieve his web gear and steel pot for field guard, and two specifications of disobeying a lawful order from his superior NCO to move out to the field for field guard and to get out of the jeep, on or about 19 August 1981.

b. He was sentenced to reduction to the grade of E-1, forfeiture of \$334.00 pay, and confinement for 30 days at hard labor.

c. The sentence was approved and ordered duly executed on 14 September 1981.

8. A DA Form 4187 (Personnel Action) shows the applicant's duty status changed from present for duty to absent without leave on 15 September 1981.

9. A DA Form 3836 (Notice of Return of U.S. Army Member from Unauthorized Absence) shows the applicant was returned to military control on 9 October 1981 and received a Chapter 10 (Discharge for the Good of the Service) discharge.

10. The applicant's record is void of the complete facts and circumstances surrounding his discharge however his DD Form 214 shows he was discharged on 9 October 1981, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, administrative discharge conduct triable by court-martial, in the grade of E-1. He received a UOTHC character of service, with separation code JFS and reenlistment code RE-3B.

11. A DD Form 215 was issued on 12 April 1989, showing he entered active duty on 11 June 1980. He was credited with 1 year, 3 months, and 6 days of net active service with lost time from 15 September 1981 to 8 October 1981.

12. On 9 April 2010, his request for an upgrade of his discharge was denied by the ABCMR. The Board found the evidence presented did not demonstrate the existence of a probable error or injustice and determined that the overall merits of his case were insufficient as a basis for correction of his records.

13. Discharges under the provisions of AR 635-200, Chapter 10, are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. An UOTHC characterization of service is normally considered appropriate.

14. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

15. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR in essence requesting an upgrade of his under other than honorable conditions characterization of his service. He states that his multiple failures to obey commands was due to hearing loss and that the subsequent discipline for these violations led him to go absent without leave.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the Regular Army on 11 June 1980 was discharged on 9 October 1981 under the provisions provided in chapter 10 of AR 635-200, Personnel Management – Enlisted Personnel (1 March 1978): Discharge for the Good of the Service – Conduct Triable by Court Martial.

d. No medical documentation was submitted with the application and his period of service predates the EMR.

e. Part II of the applicant's Personnel Qualification Record (DA Form 2-1) show the applicant was not to be assigned to "Noise Hazardous Duty." Though he was on this hearing profile, it must be assumed his continued presence in the Army meant his hearing was not so limited that it prevented him from continuing to serve and that it met the medical retention standards in chapter 3 of AR 40-501, Standards of Medical Fitness

f. The applicant received several Article 15's for violations including failure to obey a lawful order, failure to repair, and disrespect. On 14 September 1981, he was found guilty at a summary court-martial of disrespect and failures to obey lawful commands,

g. The applicant went absent without leave from 15 September 1981 thru 9 October 1981

h. Neither the applicant's separation packet nor documentation addressing his separation was available for review.

i. JLV shows he sought help for a lack of housing in 2008 as a non-service-connected Veteran. There are no medical diagnoses on his medical problem list.

j. It is the opinion of the ARBA medical advisor that a discharge upgrade is not warranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

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 that a discharge upgrade is not warranted. The opine noted, there are no medical diagnoses on his medical problem list. The Board found no error in the applicant DD Form 214 that warrants a change in Item 12a (Date Entered AD This Period) to show his entry date as 11 June 1980.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and pattern of misconduct. The Board noted the applicant's record is absent the complete facts and circumstances surrounding his discharge. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year, 3 months, and 6 days of net active service with lost time from 15 September 1981 to 8 October 1981. 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 to honorable. Therefore, 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 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 AR20090017366 on 9 April 2010.



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 (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 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 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. The ABCMR may, in its discretion, hold a hearing. 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, in effect at the time, provided guidance for the administrative separation of enlisted personnel:

a. Chapter 10 of this regulation provided a member who has committed an offense or offenses, the punishment for which, under the UCMJ and the Manual for Courts-Martial, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the Service. The discharge request may be submitted after court-martial charges are preferred against the member, or, until final action on the case by the court-martial convening authority. A member who is under a suspended sentence of a punitive discharge may also submit a request for discharge for the good of the Service. An UOTHC discharge certificate normally is appropriate for a member who is discharged for the good of the Service. However, the separation authority may direct a general discharge certificate if such is merited by the member's overall record during the current enlistment.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and

general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

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. 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. 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//