

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230012878

APPLICANT REQUESTS: upgrade of his under other than honorable conditions discharge to a general discharge under honorable conditions because, while on active duty, the applicant suffered other mental health conditions, which contributed to his adverse separation.

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

- DD Form 293 (Application for Army Discharge Review Board)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, United States Code (USC), section 1552 (b) (Correction of Military Records: Claims Incident Thereto). 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, in effect, he was in the process of transitioning from the Indiana Army National Guard (INARNG) to active duty when he decided to go home to visit his wife; they had recently separated.

a. On arriving at his wife's house, his wife's boyfriend confronted him and shot him in the left leg with a shotgun. He was brought to a local hospital for life and limb-saving surgery, and, after surgery, they put him in traction and kept him heavily sedated.

b. The applicant's unit found him in the hospital and tried to force him to return, even though he was still in post-surgery traction. Because of his injuries, the Army declared the applicant absent without leave (AWOL) and summarily discharged him under other than honorable conditions.

3. A review of the applicant's service records reveals the following:

a. On 21 August 1975, after completing a little over 2 months in the INARNG and receiving an honorable discharge, the applicant reenlisted in the INARNG for 6 years. On 11 January 1976, he entered initial active duty for training and, following the award of a military occupational specialty, the Army honorably released the applicant from active duty, on 30 April 1976, and returned him to the INARNG. His DD Form 214 (Report of Separation from Active Duty) shows he completed 3 months and 20 days of net active duty.

b. Effective 31 May 1977, the INARNG promoted the applicant to private first class (PFC)/E-3. On 10 January 1979, INARNG Orders reduced the applicant from PFC to private (PV2)/E-2, due to inefficiency. On 13 January 1979, the applicant's INARNG commander submitted a request to place the applicant on active duty orders after the applicant accrued five unexcused absences from unit drills. On 26 April 1979, Headquarters, Fifth U.S. Army issued orders directing the applicant to report, on 6 June 1979, to the U.S. Army Reception Station (USARECSTA) at Fort Knox, KY; the orders stated the applicant was to serve an active duty term of 19 months and 25 days.

c. On 15 May 1979, the applicant's INARNG unit completed an affidavit, affirming that the unit had sent the aforementioned active duty orders to the applicant's last known address, via certified mail. Effective 5 June 1979, the INARNG separated the applicant with a general discharge under honorable conditions.

d. On 6 June 1979, the USARECSTA at Fort Knox reported the applicant as AWOL and, effective 5 July 1979, dropped the applicant from its rolls. On 8 July 1980, the applicant surrendered to civil authorities, who returned him to military control. Effective 8 July 1980, orders reassigned the applicant to the U.S. Army Personnel Control Facility (PCF) at Fort Knox.

e. On 17 July 1980, the PCF preferred court-martial charges against the applicant for violating Article 86 (AWOL), Uniform Code of Military Justice (UCMJ), in that he had been AWOL from 6 June 1979 to 8 July 1980 (398 days). On 21 July 1980, after consulting with counsel, the applicant voluntarily requested discharge in lieu of trial by court-martial under chapter 10 (Discharge for the Good of the Service), Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel). In his request, he stated no one subjected him to coercion and counsel had advised him of the implications of his request; he further acknowledged he was guilty of the charge. He elected to submit a statement in his own behalf; he wrote the following:

(1) The applicant stated his age and that he had completed the 11th grade prior to entering the INARNG; he joined because he wanted to learn a skill. Unfortunately, "it just did not work out...I was a NG (National Guard)...they sent me active, that (is) when I went AWOL."

(2) The applicant declared that he did not report for active duty because of his family and due to the fact that someone shot him. He stated he was submitting this discharge request because he had a 9-week-old baby at home, and he wanted to see her; additionally, his family needed him, and the baby's mother was unable to care for two children by herself.

f. On 21 July 1980, the PCF leadership approved excess leave for the applicant, and he departed Fort Knox that same day. On 6 August 1980, the separation authority approved the applicant's separation request and directed his under other than honorable conditions discharge; additionally, the separation authority ordered the applicant's reduction to the lowest enlisted grade.

g. On 19 August 1980, orders discharged the applicant accordingly. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 month and 12 days of his 19-month, 25-day active duty obligation. The report additionally reflected the following:

4. 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 a mental health condition 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 INARNG on 21 August 1975; 2) On 17 July 1980, court-martial charges were preferred against the applicant for being AWOL from 6 June 1979 to 8 July 1980 (398 days); 3) The applicant was discharged on 19 August 1980, Chapter 10, Administrative Discharge – Conduct Triable by Court-Martial. His service was characterized as UOTHC.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder while on active service.

d. A review of JLV provided evidence the applicant has been aided for homelessness and substance abuse since 2004 by the VA. He has also been treated for Major Depression, which was not considered to be a service-connected condition. The applicant does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced a mental health condition which mitigates his misconduct. He has been diagnosed with Major Depression after his discharge, but it was not determined to be related to his military service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did go AWOL, which could be avoidant behavior and a natural sequelae to some mental health conditions. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.¹

BOARD DISCUSSION:

The Board carefully considered the applicant's request, 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.

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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 (Ex Parte Communications Prohibited) requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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 applicant's (and/or their counsel) prior to adjudication.

3. AR 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 1-13b (General Discharge). A general discharge was a separation under honorable conditions and applied to those Soldiers whose military record was satisfactory, but not sufficiently meritorious to warrant an honorable discharge.

b. Section II (Secretarial Authority), Paragraph 5-3 (Authority). The separation of enlisted personnel was the prerogative of the Secretary of the Army. The discharge of any enlisted member of the Army for the convenience of the government was to be at the Secretary's discretion, with the issuance of an honorable or a general discharge certificate, as determined by the Secretary.

c. Chapter 10 applied to Soldiers who had committed an offense or offenses for which the punishment under the UCMJ included a punitive (i.e., bad conduct or dishonorable) discharge.

(1) Soldiers could voluntarily request discharge once charges had been preferred; commanders were responsible for ensuring such requests were personal decisions, made without coercion, and following being granted access to counsel. Commanders were to give the Soldier a reasonable amount of time to consult with counsel prior to making his/her decision.

(2) The Soldier made his/her request in writing, which certified he/she had been counseled, understood his/her rights, could receive an under other than honorable conditions character of service, and recognized the adverse nature of such a character of service. Consulting counsel was to sign the request as a witness.

4. The Manual for Courts-Martial, in effect at the time, showed punitive discharges were among the maximum punishments for violations of Article 86 (AWOL for more than 30 days).

5. AR 600-200 (Enlisted Personnel Management System), in effect at the time, prescribed policies and procedures for enlisted promotions and reductions. Paragraph 7-64c (Reasons for Reduction – Approved for Discharge from Service under Other Than Honorable Conditions) stated commanders were to reduce Soldiers discharged under

other than honorable conditions to the lowest enlisted grade; no board action was required.

6. AR 635-5 (Separation Documents), in effect at the time, prescribed policies and procedures for DD Form 214 preparation. The regulation stated the narrative reason for separation was tied to the Soldier's regulatory separation authority and directed DD Form 214 preparers to AR 635-5-1 (Separation Program Designators (SPD)) for the appropriate entries in item 28 (Narrative Reason for Separation).

7. AR 635-5-1, in effect at the time, stated Soldiers separated in accordance with chapter 10, AR 635-200 were to receive an SPD of "JFS" and have, "Administrative Discharge – Conduct Triable by Court-Martial" entered in item 28 of their DD Form 214.

8. AR 601-280 (Army Reenlistment Program), in effect at the time, prescribed policies and procedures for the reenlistment of current and former Soldiers.

a. Paragraph 2-22b (Waivable Disqualification/AWOL/Time Lost) stated the Commanding General, U.S. Army Military Personnel Center could approve a reenlistment waiver for former Soldiers who had been AWOL for more than 30 days.

b. Appendix D (Reenlistment Eligibility (RE) Codes) showed the following:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for reenlistment unless waiver consideration was permissible and was granted
- RE-3B – Waiver required due to the applicant having lost time
- RE-4 – Not eligible for reenlistment. Nonwaivable disqualification

9. 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 PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions 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.

10. 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 Board 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 Post Traumatic Stress Disorder (PTSD); Traumatic Brain Injury (TBI); 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.

11. 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//