

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230013040

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), dated 27 August 2023

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 AR20070007007 on 25 October 2007.

2. As a new argument, the applicant states he was a young Soldier who made a mistake and used poor judgment. He paid for his bad decision. If he would have been given mental health support, it would have saved his career. His direct supervisor was the cause of his misconduct. He has been a homebuilder for 20 years.

3. The applicant enlisted in the Regular Army on 26 July 1976, for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 71G (Medical Records Specialist). The highest rank he attained was private first class/E-3.

4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on five occasions:

a. On 15 December 1976, for unlawfully striking Private J.V. in the face with a chair and wrongfully communicating a threat to kill him, on or about 14 December 1976. His punishment consisted of forfeiture of \$87.00 pay for one month.

b. On 15 December 1977, for failing to obey a lawful order, being drunk and disorderly at the barracks, and resisting lawful apprehension, on or about 22 October 1977. His punishment consisted of 15 hours of extra duty.

c. On 24 March 1978, for two specifications of failing to obey a lawful regulation by not having his haircut within guidelines, on or about 10 March 1978, and for wearing tennis shoes with his fatigue uniform in the mess hall, on or about 14 March 1978. His punishment consisted of forfeiture of \$75.00 pay and 12 hours of extra duty.

d. On 6 April 1978, for being disrespectful in language to his superior noncommissioned officer (NCO), on or about 3 January 1978, and three specifications of failing to go at the time prescribed to his appointed place of duty, between on or about 3 January 1978 and 10 January 1978. His punishment consisted of reduction to private/E-2, forfeiture of \$150.00 pay, and extra duty for 15 days.

e. On 13 March 1979, for stealing a jacket, of a value of about \$150.00, on or about 4 January 1979. His punishment consisted of 14 days of extra duty and 30 days of restriction.

5. General Court-Martial Order Number 71, Headquarters VII Corps, APO New York, issued on 16 July 1979, shows the applicant was charged with wrongfully selling heroin, possession of 1.01 grams of marijuana, residue of marijuana, and residue of heroin, on or about 5 September 1978. He pled not guilty to all of the charges. On 14 March 1979, the proceedings were terminated by the Military Judge, due to the "applicant's" subsequent administrative discharge.

6. The applicant consulted with legal counsel on 16 March 1979.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the UCMJ, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge for the good of the service, under the provision of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. The applicant stated, in effect, his previous request for discharge was disapproved by the VII

Corps Commander. At the time of disapproval, it was expected his trial would proceed forthwith. Due to an essential witness's inability to travel, the trial would not take place for at least two more months. The additional delay in resolving the serious charges against him would have a deleterious effect on him and his unit.

7. The applicant's immediate and intermediate commanders recommended approval of the request for discharge, further recommending a UOTHC discharge.

8. The separation authority approved the applicant's request for discharge for the good of the service on 6 April 1979 and further directed reduction to the lowest enlisted rank and the issuance of a DD Form 794A (UOTHC Discharge Certificate).

9. The applicant underwent a pre-separation medical examination on 11 April 1979. The relevant Standard Form (SF) 93 (Report of Medical History) and corresponding SF 88 (Report of Medical Examination) show the applicant reported feeling fine, and he was deemed qualified for separation.

10. The applicant was discharged on 23 April 1979. His DD Form 214 (Report of Separation from Active Duty) confirms his character of service was UOTHC, with separation code JFS and reenlistment code RE-3. He was credited with 2 years, 8 months, and 28 days of net active service.

11. The Army Discharge Review Board (ADRB) reviewed the applicant's discharge on or about 3 November 1982 and determined he was properly and equitably discharged. His request for a change in his characterization of service was denied.

12. The ABCMR reviewed the applicant's petition for an upgrade of his discharge on 25 October 2007. After careful consideration, the Board determined that based upon the applicant's record of indiscipline, his service did not meet the standards of acceptable conduct and performance. Therefore, he was not entitled to either a general or honorable discharge. The Board denied his request.

13. The applicant provides a statement of support, dated 27 August 2023, wherein the author states, the NCO who led the applicant down the "wrong dark road" was the cause of his UOTHC discharge. He knows the applicant's honorable character. The applicant was only 5 percent (%) responsible; his NCO was 95% responsible for his actions.

14. 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. A UOTHC characterization of service is normally considered appropriate.

15. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable. The applicant's previous consideration is summarized in Docket Number AR20070007007 on 25 October 2007. He contends his behavior was related to Other Mental Health Issues which mitigates his misconduct. In particular, the applicant asserts that his supervisor was the cause of his actions and if he had been provided mental health support that his military career would have been saved. 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 26 July 1976 as a 71G (medical records specialist) and achieved the rank of E-3, 2) he received an Article 15 on five occasions: 15 December 1976 for unlawfully striking another Soldier in the face with a chair and communicating a threat to kill him on or about 14 December 1976; 15 December 1977 for failing to obey a lawful order, being drunk and disorderly at the barracks, and resisting lawful apprehension on or about 22 October 1977; 24 March 1978 for two specifications of failing to obey a lawful regulation by not having his haircut within guidelines on or about 10 March 1978 and on or about 14 March 1978 for wearing tennis shoes with his fatigue uniform in the mess hall; on 06 April 1978 for being disrespectful in language to his superior noncommissioned officer (NCO) on or about 03 January 1978 and three specifications of failing to go at the time prescribed to his appointed place of duty between 03 January 1978 and 10 January 1978; and on 13 March 1979 for stealing a jacket, 3) general court-martial charges were preferred against the applicant on 16 July 1979 for wrongfully selling heroin, possession of 1.01 grams of marijuana, and residue of heroin, on or about 05 September 1978. He pled not guilty to all of the charges. On 14 March 1979 the proceedings were terminated by the military judge due to the applicant's subsequent administrative discharge, 4) the applicant underwent a pre-separation medical examination on 11 April 1979 and was cleared for separation, 5) the applicant requested discharge for the good of the service under the provisions of Army Regulation (AR) 635-200, Chapter 10. The applicant was discharged on 23 April 1979 with a separation code of JFS, 6) the applicant's previous petitions for discharge were denied by the Board.

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 provided for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service Report of Medical History dated 04 November 1979 documented that the applicant stated he felt fine. The applicant marked 'no' on the form regarding history of depression or excessive worry or nervous trouble of any sort. Psychiatric was also documented as 'normal' upon clinical evaluation and the applicant was cleared for separation. There were no other in-service medical records available for review.

d. VA records were available in JLV from 20 April 2009 to 08 July 2024. The applicant is 0% service connected through the VA for several physical health conditions (for treatment only). The applicant is not service connected through the VA for any BH conditions. He was evaluated on 15 April 2014 by a behavioral health provider to determine appropriateness of treatment for one of his medical conditions. The applicant was diagnosed with Unspecified Depressive Disorder with a rule out of Unspecified Anxiety Disorder. The applicant has also been treated for Agoraphobia through the VA. There is no documentation in the record associating the onset of his BH conditions with the applicant's military service.

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 for the applicant in-service. BH conditions that have been diagnosed and treated through the VA post-discharge have not been associated with the applicant's time in service nor has he been service connected through the VA for any BH conditions. More importantly, even if the applicant did have a mitigating in-service BH condition, conditions that would fall under Other Mental Health Issues and otherwise provide the basis of support for BH mitigation would not interfere with the applicant's ability to understand the difference between right and wrong and act in accordance with the right. As such, even if a mitigating condition did exist, BH mitigation would not be supported based on the circumstances that led to separation.

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. The opined noted, there is insufficient documentation in the applicant's record associating the onset of his BH conditions with his military service.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of unlawfully striking another Soldier in the face with a chair and wrongfully communicating a threat to kill him, disrespectful in language to his superior noncommissioned officer (NCO) and being drunk and disorderly at the barracks. The Board noted the applicant's post service achievements of being a homebuilder for 20 years and his character letter of support attesting to his character after his discharge. However, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested reconsideration relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a general under honorable conditions discharge. Therefore, the Board denied relief.

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 AR20070007007 on 25 October 2007.



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. Section 1556 of Title 10, U.S. Code, 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.

2. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. 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.

c. Paragraph 3-7b provides that 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.

3. 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. 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.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to 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//