

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230013057

APPLICANT REQUESTS:

- an upgrade of his other than honorable conditions discharge to honorable or in the alternative general under honorable conditions
- change the narrative reason for separation from separation program number (SPN) 246 (for the good of the service) to convenience of the government or in the alternative secretarial authority with corresponding separation and reentry codes

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

- DD Form 149 (Application for Correction of Military Record)
- Request to advance on docket due to advanced age
- Brief in Support of Application
- Exhibit A: Medical Records (SF 88), 13 May 1971
- Exhibit B: Acknowledgement of Punishment
- Exhibit C: Post-Service Medical Evaluation
- Exhibit D: Support statement by M.J.L.
- Exhibit E: Rating Decision, 21 November 2019
- Exhibit F: Report of Mental Status Evaluation
- Exhibit G: Report of Medical History (SF 93)
- Exhibit H: Summary of Court Martial Order (SCM Order Number 5)
- Exhibit I: Personal statement by applicant
- Exhibit J: Service summary records (DA Form 20)
- Exhibit K: Service Summary (DD Form 214)
- Exhibit L: Claim Decision, 23 November 2019
- Exhibit M: Letter from CMD, 14 April 2022
- Exhibit N: Support statement W.M.
- Exhibit O: Support statement R.B.
- Exhibit P: Support statement Rev. R.A.C.
- Exhibit Q: Support statement R.F.T.
- Exhibit R: Support statement A. and H.O.
- Exhibit S: Spouse support statement H.S.O.

- Exhibit T: Updated support statement H.S.O.
- Exhibit U: Letter from the court clerk Superior Court of CA County of Merced
- Exhibit V: Complete service personnel and medical records (198 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 it was an error for him to be discharged other than honorable after suffering a severe head injury. He is still suffering with the consequences of the traumatic brain injury (TBI), depression, memory loss and the bad discharge. It is in the interest of justice for this honorable board to correct the injustice he has suffered for 50 years. The Carson Memorandum specifically allows the Board to waive this time limit where a Veteran has been diagnosed with a mental illness because fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside the time limit. In this matter, he has a diagnosis of TBI with secondary depression and has suffered with a bad discharge for 50 years, but he was only recently able to access legal assistance from the Veterans Consortium.

a. In a personal statement (Exhibit I) he described his childhood growing up in California. He was partying, drinking, and smoking pot which led to his grades at school dropping. His dad said straighten up or leave his home. Being the knuckle head that he was he left. He joined the military, and his military occupational specialty was 13A (Field Artillery). He was stationed in Germany and ran a M109 Howitzer. He was going well in his life until he was thrown off a Howitzer.

b. After being in a coma for four days, he remembers he could not even pick up a glass of water. After a few days he got out of bed if there was a wall, he could hold onto he could walk. His mind was so wacked out he thought he was crazy afraid the doctors would put in an insane asylum because of this when he spoke to the doctors, he told them he was fine and to let him return to his unit for some reason he remembers yelling at a doctor he does not remember why but he does remember he did understand what he was saying. Afterwards if he was talking, he would get lost in his words and could not remember what he was trying to say. Most of the time he was scared, angry, his head would shake constantly, and his body hurt everywhere. When he would talk with someone he usually stopped talking because he would forget what he was trying to say.

c. During these days he was self-medicating with uppers and downers a friend of his went downtown to pick up his prescriptions. On the way back the German police did not think it was such a good idea, so they were arrested and turned over to an E7 at the

base. He asked the E-7 what he thought would happen. He was told he would probably do two years at Leavenworth then come back to do the rest of his tour. This was devastating to his entire state of being. Prison no way no how, so he figured before any paperwork got started, he went into the office and asked the clerks to send him to Vietnam. He was told he would not be sent but he could resign for the good of the service and get an other than honorable conditions discharge. This was better than going to prison.

d. He did not speak to anyone else. The unit filled out the paperwork was upset that he received an undesirable discharge, so he was lied to. After returning to the US his life was messed up. With his TBI he felt like it was a dark cloud over his head. As he returned home after two years, he was still only eighteen self-medicating and drinking like a fish. He described his life after service which he struggled with drinking and drugs to deal with his mental health issues. (The entire letter is available at Exhibit I in supporting documents).

3. Counsel states the applicant is an Army Veteran. He dropped out of high school and enlisted in the Army during the height of the Vietnam war. He served from 24 May 1971 until he was discharged on 4 June 1973. The discharge related to his conduct while stationed at Daley Barracks, Bad Kissingen, Germany.

a. His conduct, in retrospect, can be explained. During his service, he suffered a TBI after falling from a Howitzer and experienced depression, post-traumatic headaches, and memory loss. These conditions impacted his behavior, and he admits to having difficulties with complying with authority. In order to cope with his condition, he began to self-medicate with alcohol and marijuana, which exacerbated his conduct. He received an under other than honorable discharge from the United States Army after two years of service.

b. He completed his first year of service without issue. However, on 26 July 1972, he fell from a Howitzer and suffered a TBI. He was taken to Wurzburg Army Hospital and was unconscious for four days. While in service and following his TBI, he was diagnosed with depression and memory loss, and experienced behavioral changes. It was only after he suffered the TBI and accompanying behavioral changes that he ran into the disciplinary problems that led to his discharge. On 21 November 2019, the Department of Veterans Affairs determined his TBI, including memory loss, post-traumatic headaches, anxiety, and depression were directly related to the head injury and loss of consciousness during his military service.

c. The character of a discharge is generally determined by taking a holistic view of the member's service. The overwhelming majority of military discharges are characterized as "honorable" and commonly indicate "acceptable, rather than exemplary service," while anything less than "honorable" is often "viewed as derogatory,

and inevitably stigmatizes the recipient." Bland v. Connally, 293 F.2d 852, 853 (D.C. Cir. 1961). If a discharge characterization is erroneous or inequitable for any reason, then the Board is empowered by the Secretary of the Army to change that characterization to "correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1).

d. The Hagel Memorandum and subsequent Carson Memorandum instruct review boards to consider whether PTSD, TBI, or other mental health conditions were mitigating factors in the misconduct that led to a veteran's discharge. In 2017, clarifying guidance (the Kurta Memorandum) was issued on mental health conditions. The guidance requires the Board to make four inquiries:

- (1) Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- (2) Did that condition exist/experience occur during military service?
- (3) Does the condition or experience actually excuse or mitigate the misconduct?
- (4) Does that condition or experience outweigh the discharge?

e. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge. Conditions or experiences, including TBI's and mental health conditions, that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge. Although liberal consideration does not mandate an upgrade, relief may be appropriate for minor misconduct commonly associated with mental health conditions. Given the standards, the memorandum creates a presumption in favor of an upgrade when a Veteran presents evidence of a TBI or mental health condition that contributed to the conduct that led to the discharge.

f. In a statement of material contentions counsel states the applicant's misconduct leading to his discharge was a result of the TBI suffered during his military service. He suffered from depression, memory loss, and post-traumatic headaches, which contributed to the misconduct leading to his discharge. The other than honorable discharge was an injustice because his commanders would not have discharged him, or would have opted for a less prejudicial discharge, if applying today's standards.

g. Counsel argues the applicant's discharge was an injustice because his TBI and mental condition were major contributing factors in the misconduct. His TBI and mental health conditions existed during service. His condition excuses and mitigates the discharge because the misconduct was a direct result of his TBI and mental health conditions and outweighs his misconduct. (Explained in detail in counsel brief in support of application).

h. The applicant's service meets the requirement for an honorable discharge. His service meets the requirements for an honorable discharge. He enlisted in the Army in May of 1973 at the age of 16 and completed his recruitment training successfully. He enlisted as a private (E-1) and, after four months, was promoted to private first class (PFC)/(E-3). During his service, he completed his General Education Diploma and was awarded the National Defense Service Medal and Sharpshooter Badge with Rifle Bar. Everything was "going good" until he was thrown from the Howitzer and experienced a TBI. His conduct, as explained above, is entirely tied to his TBI and is mitigated by the same. As such, his service meets the requirements of honorable discharge.

i. The Narrative Reason for Separation should be changed from "Undesirable" to "Convenience of the Government" or "Secretarial Authority." In addition to an upgrade to his type of discharge, the narrative reason for separation on his DD Form 214 should be changed from "SPN# 246" (for the good of the service) to "Convenience of the Government" or "Secretarial Authority." His conduct, as explained throughout this brief, is tied to the TBI he suffered during his military service. Describing the reason for separation as "SPN#246" does not fully capture the mitigating circumstances, including, his TBI, depression, post-traumatic headaches, and memory loss. Were the applicant's Army service to occur today, it is likely his conditions, which have been diagnosed by medical professionals, would lead to a narrative reason of "Separation for Convenience of the Government" or "Separation by Secretarial Authority."

j. Although the applicant's impairment during his Army service was severe, his misconduct, described as disrespectful and threatening, was non-violent. Furthermore, he could not have engaged in any willful misconduct because he met the definition of insanity at the time of his discharge. This Honorable Board has the opportunity to correct this injustice under the Wilke Memo's guidance: Relief is generally more appropriate for nonviolent offenses than for violent offenses. His mental state and TBI mitigate his relatively minor misconduct.

k. Since 1972, he has suffered from and struggled with the effects of his in-service TBI. From the time of his separation on, he has had the support of many members of the community, a friend and fellow soldier, and his parents. His wife has known him for 40 years and has witnessed the residual effects of his TBI, including memory loss, mood swings, anxiety and depression. Additionally, he has shown good conduct and character after his military service. His narrative reason for separation should be changed to more accurately reflect the circumstances of his character and service.

l. In conclusion counsel states when he enlisted in the Army, he was sixteen years old. During his service he suffered a TBI. The effects of that condition took their toll on him and directly contributed to the conduct that resulted in his discharge from the service. Because he was not yet aware of the cumulative effects of his TBI, the misconduct that formed the basis for his discharge occurred. But the misconduct is

linked to and mitigated by his TBI suffered during service. For the reasons discussed herein, the applicant respectfully requests that the Board change the characterization of his discharge from "Other Than Honorable" to "Honorable" or, in the alternative, "General Under Honorable Conditions." Additionally, he respectfully requests that the Board change the narrative reason for separation of "SPN 246" to "convenience of the government" or in the alternative "secretarial authority" with corresponding separation and reentry codes.

4. The applicant enlisted in the Regular Army on 24 May 1971. He held military occupational specialty 13A, Field Artillery, Basic. He served in Germany from 26 October 1971 to 1 June 1973.
5. On 20 January 1972, he received non-judicial punishment (NJP) for on or about 14 January 1972, failed to obey a direct order.
6. On 18 July 1972, he received NJP for on or about 13 July 1972, failed to obey a direct order. He was reduced to private/E-2.
7. On 26 September 1972, a bar to reenlistment was initiated. His commander annotated he cannot follow orders, his conduct and attitude were substandard, and he cannot adapt to military life. He did not submit a statement on his own behalf. His bar was later approved on 27 November 1972.
8. On 20 October 1972, the applicant was convicted by a summary court-martial in Wurzburg, Germany of:
 - Charge I: one specification of on or about 22 September 1972, being drunk and disorderly in station and on or about 22 September 1972, wrongfully communicating a threat to his commanding officer
 - Charge II: one specification of on or about 22 September 1972, behaving himself with disrespect toward a commanding officer, and one specification of on or about 5 September 1972, behaving with disrespect toward a commissioned officer, his superior officer
 - Charge III: one specification of on or about 22 September 1972, did treat with contempt and was disrespectful in deportment toward his superior non-commissioned officer
9. The court sentenced him to be reduced to grade private (E-1), to forfeit \$175.00 per month for one month, and to perform fourteen days extra duty.
10. On 6 February 1973, the convening authority approved his sentence and ordered it executed.

11. On 16 February 1973, he received NJP for on or about 9 February 1973, absent himself from his appointed place of duty at which he was required to be.

12. On 9 May 1973, a Report of Mental Status Evaluation was conducted. It showed his behavior as normal, level of alertness as fully alert, level of orientation as fully oriented, mood as depressed, thinking process clear, thought content was normal, and memory was good. Impression was no significant mental illness. He was mentally responsible, able to distinguish right from wrong, and able to adhere to the right. He had the mental capacity to understand and participate in board proceedings. He met the retention standards prescribed in Army Regulation (AR) 40-501 (Standards of Medical Fitness).

13. He underwent a medical examination on 9 May 1973. The evaluation showed abnormal upper extremity which he had swollen proximal interphalangeal joint ring finger left hand. He had head trauma July 1972 with abrasions, caught finger in breech block January 1973. He was qualified for separation.

14. The complete facts surrounding his separation are void of his available service record. However, his DD Form 214 shows he was discharged under conditions other than honorable on 4 June 1973, under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), paragraph 10-1. He was assigned SPN 246 and Reenlistment Code 4. He completed 2 years and 11 days net service this period. He was awarded or authorized the National Defense Service Medal and Sharpshooter Marksmanship Qualification Badge (M-16).

15. There is no evidence within the applicant's available service records that show he applied to the Army Discharge Review Board within the Board's 15-year statute of limitations.

16. The applicant provides:

a. Post-Service Medical Evaluation showing he filed for mood disorder due to a general medical condition which he underwent an examination on 10 September 2019.

b. Rating Decision, 21 November 2019, showing he was service connected for TBI, post-traumatic headaches, mood disorder due to a general medical condition, left shoulder strain, tinnitus, right ear hearing loss.

c. Claim Decision, 23 November 2019, notifying the applicant of the decision made on his conditions claimed.

d. Support statement by M.J.L. stating he knew the applicant since grade school and was stationed with him in Germany. He stated once the applicant was in a coma

from falling off of the Howitzer, he was pretty messed up medically. (The entire letter is available for review at Exhibit D).

e. Support statement W.M. explaining his professional relationship with the applicant. Stating he has contributed many volunteer hours for anything the union stands for and supports its issues. (The entire letter is available for review at Exhibit N)

f. Support statement R.B. stating the applicant attends his class and is a model student. His attendance and grades are well above average and Mr. R.B. feels as the applicant feels that because he was unable to adapt to the military life, is not a sufficient reason for him to carry the burden of an undesirable discharge for the rest of his life. Mr. R.B. feels the applicant's sublimation and his conduct are beyond reproach.

g. Support statement Rev. R.A.C. states the applicant would like to have his discharge changed from undesirable to honorable. He would like to see this done in view of the two full years he served with the Army and in view of the opportunity he now has for training in, data processing. Since the future seems promising for him at this time, a change in the status of his discharge would seem to be highly desirable.

h. Support statement R.F.T. a teacher from high school states the applicant was an interested student, he was unable to complete the year because he enlisted in the U.S. Army. At the time of withdrawal from his class, the applicant was earning a "B." Since the course involved the study of minority problems and contributions to the United States, he showed much interest in the course. His participation in class was good. His interest and diligence demonstrated to him important attributes of good character. He also states although the applicant has encountered some behavioral problems; he believes that the applicant is of good character and will perform in future programs. The fact that he received his G.E.D. while in the service indicated his concern about the future. He is sincere and, from his point of view, trustworthy and competent. He believes the applicant is of good character.

i. Support statement A. and H.O. both state in view of the fact that the applicant enlisted in the Army at the age of 16, they do not believe he was yet mature enough to handle his situation at that time. In the past he was full of confusion, since his return to civilian life he has had time to look into the past and realize where he now stands in life. He is presently thinking very much of his future and being a bright young man with a promising future in site. They believe he should not be deprived of his right to get ahead and make something of himself just because of the status of his discharge.

j. Spouse support statement H.S.O. states she met the applicant around 1984, he seemed to be a nice guy. He has a weird personality, one day he could be nice and then just flip over and be mean like he is two people. He stays asleep all the time. When they go places, he is very rude to people and thinks that is normal. He says crazy stuff

and does things he does not remember. She met his friends from his childhood, and they say he was a nice guy until he went to the Army. Its like he is confused then he just gets depressed and wants to sleep. (The entire letter is available for review at Exhibit S).

k. Updated support statement H.S.O. states after a lot of complaining from herself he has gone to the VA clinic and complained about his mood swings getting out of control. His Dr C.M.M. has prescribed Trazodone, this stuff has changed him to be a better person. He is not as rude anymore. Not only did she see a change in him also friends and family noticed the difference and asked what is going on with him. She told them he is on meds. She can always tell when he has not taken them because he goes back to his old ways. She has almost left him and ended their marriage, but she has learned it is not him it is a sickness he has.

l. Letter from the court clerk Superior Court of CA County of Merced showing after completing a thorough search of the Court's records, no criminal complaint had been against the applicant.

m. Complete service personnel and medical records (198 pages).

17. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

18. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

19. Title 38, CFR, Part IV is the VA's schedule for rating disabilities. The DVA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the DVA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the DVA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

20. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

21. By regulation, (AR 635-200) Chapter 10 states, a member who committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. An Undesirable Discharge Certificate would normally be furnished an individual who was discharged for the good of the Service.

22. By regulation, (AR 635-5-1) lists the specific authorities – regulatory, statutory, or other directive – and reasons for separation from active duty, active duty for training, or full-time training duty.

23. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his other than honorable conditions discharge to honorable or in the alternative general under honorable conditions. In addition to a change in the narrative reason for separation from separation program number (SPN) 246 (for the good of the service) to convenience of the government or in the alternative secretarial authority with corresponding separation and reentry codes. 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 24 May 1971.
- On 20 January 1972, he received non-judicial punishment (NJP) for on or about 14 January 1972, failed to obey a direct order.
- On 18 July 1972, he received NJP for on or about 13 July 1972, failed to obey a direct order. He was reduced to private/E-2.
- On 26 September 1972, a bar to reenlistment was initiated. His commander annotated he cannot follow orders, his conduct and attitude were substandard, and he cannot adapt to military life. He did not submit a statement on his own behalf.
- On 20 October 1972, a Summary Court Martial (SCM) convened. He was found guilty of:
 - On or about 22 September 1972, was drunk and disorderly in station
 - On or about 22 September 1972, wrongfully communicate a threat
 - On or about 22 September 1972, behave himself with disrespect toward a commissioned officer, his superior officer
 - On or about 5 September 1972, behave with disrespect toward a commissioned officer, his superior officer
 - On or about 22 September 1972, did treat with contempt and was disrespectful in deportment toward his superior non-commissioned officer
- He was to be reduced to grade private (E-1), to forfeit \$175.00 per month for one month, and to perform fourteen days extra duty

- On 27 November 1972, the bar to reenlistment was approved.
- On 16 February 1973, he received NJP for on or about 9 February 1973, absent himself from his appointed place of duty at which he was required to be.
- The complete facts surrounding his separation are void of his available service record. However, his DD Form 214 shows he was discharged under conditions other than honorable on 4 June 1973, under the provisions of AR 635-200, paragraph 10-1. He was assigned SPN 246.

b. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant states it was an error for him to be discharged other than honorable after suffering a severe head injury. He is still suffering with the consequences of the traumatic brain injury (TBI), depression, memory loss and the bad discharge. It is in the interest of justice for this honorable board to correct the injustice he has suffered for 50 years. The Carson Memorandum specifically allows the Board to waive this time limit where a Veteran has been diagnosed with a mental illness because fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside the time limit. In this matter, he has a diagnosis of TBI with secondary depression and has suffered with a bad discharge for 50 years, but he was only recently able to access legal assistance from the Veterans Consortium. In a personal statement (Exhibit I) he described his childhood growing up in California. He was partying, drinking, and smoking pot which led to his grades at school dropping. His dad said straighten up or leave his home. Being the knuckle head that he was he left. He joined the military, and his military occupational specialty was 13A (Field Artillery). He was stationed in Germany and ran a M109 Howitzer. He was going well in his life until he was thrown off a Howitzer. After being in a coma for four days, he remembers he could not even pick up a glass of water. After a few days he got out of bed if there was a wall, he could hold onto he could walk. His mind was so wacked out he thought he was crazy afraid the doctors would put in an insane asylum because of this when he spoke to the doctors, he told them he was fine and to let him return to his unit for some reason he remembers yelling at a doctor he does not remember why but he does remember he did understand what he was saying. Afterwards if he was talking, he would get lost in his words and could not remember what he was trying to say. Most of the time he was scared, angry, his head would shake constantly, and his body hurt everywhere. When he would talk with someone he usually stopped talking because he would forget what he was trying to say. During these days he was self-medicating with uppers and downers a friend of his went downtown to pick up his prescriptions. On the way back the German police did not think it was such a good idea, so they were arrested and turned over to an E7 at the base. He asked the E7 what he thought would happen. He was told he would probably do two years at Leavenworth then come back

to do the rest of his tour. This was devastating to his entire state of being. Prison no way no how, so he figured before any paperwork got started, he went into the office and asked the clerks to send him to Vietnam. He was told he would not be sent but he could resign for the good of the service and get an other than honorable conditions discharge. This was better than going to prison. He did not speak to anyone else. The unit filled out the paperwork was upset that he received an undesirable discharge, so he was lied to. After returning to the US his life was messed up. With his TBI he felt like it was a dark cloud over his head. As he returned home after two years, he was still only eighteen self-medicating and drinking like a fish. He described his life after service which he struggled with drinking and drugs to deal with his mental health issues.

c. Due to the period of service, no active-duty electronic medical records were available for review. However, the applicant submitted hardcopy documentation that evidences, on 9 May 1973, the applicant participated in a Mental Status Evaluation that indicates his behavior was normal, he was alert and fully oriented, his thinking process was clear, his thought content was normal, and his memory was good. However, his mood was noted as depressed, but the diagnostic impression was of no significant mental illness. The evaluation further indicates, he was mentally responsible, able to distinguish right from wrong, and adhere to the right. He had the mental capacity to understand and participate in board proceedings and met the retention standards. In addition, he underwent a medical examination for the purpose of separation on 9 May 1973. The examination indicated head trauma in July 1972 and the applicant endorsed symptoms consistent with TBI including, mild memory loss, headaches, and dizziness. He was qualified for separation.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. The VA electronic medical record indicates the applicant participated in a TBI consult on 11 December 2020, however, based on the assessment secondary TBI screening was not recommended. The primary diagnostic impression was substance abuse, and he was recommended for treatment via addiction medicine. The applicant declined treatment via addiction medicine and services were discontinued. He participated in an intake assessment on 8 March 2021, where he reported a history of TBI, however, once again based on the assessment, secondary TBI screening was not recommended. The primary diagnosis was substance abuse, with the applicant reporting an over 20-year history of daily alcohol consumption (2 to 12 drinks daily), as well as the use of "meth, speed, and marijuana a few times per week". Based on his history, it was recommended he participate in SUD treatment, the applicant declined. The applicant was provided with an MRI of the brain on 24 May 2021, results indicated no acute abnormalities "no acute infarct, hemorrhage or intracranial mass" but did indicate "mild chronic small vessel ischemic changes with a

few old lacunar infarcts". Overall, the VA electronic medical record does not provide evidence participation in behavioral health treatment or a diagnosis of TBI. However, a C and P examination dated 14 October 2019 diagnosed the applicant with a Mood Disorder due to general medical condition and notes the applicant self-reported mild TBI symptoms, including mild memory impairment, occasional headaches, irritability, and verbal aggression. In addition, the applicant provides hardcopy documentation of a VA rating decision dated 21 November 2019, that indicates the applicant was granted service connection for treatment purposes only, for TBI, posttraumatic headaches, and Mood Disorder due to general medical condition.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a BH condition during military service that partially mitigates 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 a mitigating condition, TBI.

(2) Did the condition exist or experience occur during military service? Yes. The applicant was granted service connection, for treatment purposes only, for a TBI, posttraumatic headaches, and Mood Disorder due to general medical condition. His service connection is due to a vehicle accident on July 26, 1972 where he fell of a Howitzer.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. There is evidence of a TBI during military service that mitigates some of the applicant's misconduct. His instances of behaving with disrespect and his drunk and disorderly are mitigated by his BH condition since there is a nexus between a TBI and disregard for authority as well as the use of alcohol to cope with the symptoms of the disorder. However, his wrongfully communicating a threat is not mitigated by his BH condition, since the applicant's condition does not impair his ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The complete facts and circumstances surrounding the applicant's discharge are not available (separation packet is not available). The applicant's DD Form 214

shows he was discharged from active duty under the provisions of AR 635-200, chapter 10 (in lieu of trial by court-martial) with an under other than honorable conditions character of service. He completed 2 years and 11 days of his 3-year active service contract. The Board found no error or injustice in the available separation processing.

a. Discharge Upgrade: Grant to General. The Board reviewed and agreed with the medical reviewer's determination that there is evidence of a TBI during military service that mitigates some of the applicant's misconduct. His instances of behaving with disrespect and his drunk and disorderly are mitigated by his behavioral health (BH) condition since there is a nexus between a TBI and disregard for authority as well as the use of alcohol to cope with the symptoms of the disorder. However, his wrongfully communicating a threat is not mitigated by his BH condition, since the applicant's condition does not impair his ability to distinguish right from wrong and act in accordance with the right. Additionally, the applicant provided multiple character reference letters in support of a clemency determination. Thus, the Board determined that while his service clearly did not rise to the level required for an honorable characterization (given his NJPs and court-martial conviction), however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board determined that such upgrade did not change the underlying reason for separation and thus the narrative reason for separation and corresponding codes should not change.

b. Reason for Separation: Deny. The applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 10 of AR 635-200. He committed offenses punishable under the UCMJ with a punitive discharge via a court-martial, and when court-martial charges were preferred against him, he presumably voluntarily requested a discharge in lieu of trial by a court-martial. The Board noted that the underlying reason for his separation is his request to be discharge instead of being tried by a court-martial. The only valid narrative reason under chapter 10 of AR 635-200 is in lieu of trial by court-martial which is correctly listed on his DD Form 214.

c. Separation Code and RE Code: Deny. Enlisted Soldiers who request a voluntary discharge under chapter 10 of AR 635-200 are assigned Separation Code then 246 (now KFS). This Separation Code has a corresponding RE Code of 4. The Board found his Separation Code and RE Code are neither in error nor unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant a DD Form 214 for the period ending 4 June 1973, as follows:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading his discharge to honorable, changing his narrative reason for separation, or the corresponding Separation and Reenlistment Codes.

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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, U.S. Code, 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. Army Regulation (AR) 635-200 (Personnel Separation – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of the version in effect at the time provided that a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses charged, type of discharge normally given under the provisions of this chapter, the loss of Veterans Administration benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. An undesirable discharge certificate would normally be furnished an individual who was discharged for the good of the Service.

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. AR 635-5-1(Personnel Separations – Separation Program Designators) lists the specific authorities – regulatory, statutory, or other directive – and reasons for separation from active duty, active duty for training, or full-time training duty. SPN 246 reason for separation shows Enlisted personnel – Discharge for good of the service in accordance with para 10-1, AR 635-200.

4. AR 601-210 (Regular Army and Army Reserve Enlistment Program), Table 3-1 included a list of the Regular Army RE codes:

- RE-1 applies to Soldiers completing their term of active service who are considered qualified to reenter the U.S. Army; they are qualified for enlistment if all other criteria are met
- RE-3 applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waivable. They are ineligible for enlistment unless a waiver is granted

5. 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.

6. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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. 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. 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//