

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 June 2024

DOCKET NUMBER: AR20230013092

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions (UOTHC) discharge
- a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states his discharge should be upgraded because he submitted the appropriate paperwork for an upgrade six months after he was discharged but moved to a new address and lost track of things. The applicant indicates on his DD Form 149 that post-traumatic stress disorder (PTSD) and sexual assault/harassment are related to his request.

3. On 23 November 1979, the applicant enlisted in the Regular Army.

4. The applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on the following dates for the reasons shown:

- 12 March 1980 - without authority, absenting himself from his place of duty
- 27 June 1980 - unlawfully striking two Soldiers with his fists
- 9 September 1980 - without authority, absenting himself from his place of duty
- 1 December 1980 - attempting to sabotage three missiles by painting them red

5. Special Court-Martial (SPCM) Order Number 10, issued by Headquarters, 38th Air Defense Artillery Brigade, Yongsan, Korea on 28 May 1981 shows the applicant was

arraigned before an SPCM and found guilty of one specification of failing to obey a lawful order or regulation. His sentence included reduction to private/E-1, forfeiture of \$334.00 per month for a period of 4 months, and to be confined at hard labor for 4 months. The sentence was adjudged on 2 April 1981. It was approved and ordered to be executed on 28 May 1981.

6. The applicant's record is void of documentation showing the facts and circumstances regarding his administrative separation under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, paragraph 14-33b(1). However, his record shows:

a. The applicant underwent a mental status evaluation on 13 July 1981. It was determined that he was not experiencing any significant mental illness at the time. He was found to be mentally responsible, able to distinguish right from wrong and to adhere to the right, possess the mental capacity to understand and participate in board proceedings, and to meet regulatory retention standards.

b. He declined a separation medical examination on 13 July 1981.

c. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the grade of E-1 on 15 July 1981, under the provisions of Army Regulation 635-200, paragraph 14-33b(1), by reason of Frequent Involvement in Incidents of a Discreditable Nature with Civil or Military Authorities with Separation Code "JKA" and Reenlistment Code "RE-3B." He was credited with completion of 1 year, 5 months, and 27 days of active service. His service was characterized as UOTHC.

7. Army Regulation 635-200, Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge UOTHC is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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

9. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the VA's Joint Legacy Viewer (JLV). There were no available records in the Interactive Personnel Electronic Records Management System (iPERMS) or in the Health Artifacts

Image Management Solutions (HAIMS) for this case. The applicant requests discharge upgrade from Under Other Than Honorable Conditions. He also appears to request eligibility for medical and dental benefits. He stated that his request was related to PTSD and Sexual Assault/Harassment.

2. The ABCMR ROP summarized the applicant's record. The complete facts and circumstances surrounding his discharge are unknown. The applicant entered the Regular Army 23Nov1979. His MOS was Food Service Specialist. He was stationed in Korea 19800403 to 19810324. He was discharged 15Jul1981 under provisions of AR 635-200 para 14-33b(1) due to frequent involvement in incidents of a discreditable nature with civil or military authorities. His service was characterized as Under Other Than Honorable Conditions.

a. His record contained instances of being absent without authority (04Mar1980 and 01Sep1980); one instance of unlawfully striking two different soldiers (21Jun1980) and an attempt to sabotage three missiles on the Tac Site by painting them red (during 14-16 November 1980). The record also documented a special court-martial convened 15Jan1981 in Korea during which he was found guilty of failing to obey an order to get back on the truck to the TAC Site (22Feb1981) and was adjudged hard labor confinement for four months.

b. The applicant underwent Mental Status Evaluation on 13Jul1981—no abnormalities were noted in his behavior, mood, memory, thought content or thought process. Significant mental illness was not found. He was able to distinguish right from wrong and adhere to the right. He was able to understand and participate in board proceedings. He met retention standards of AR 40-501 chapter 3. He waived a medical examination.

3. JLV records were sparse, likely due to the character of his discharge and non-eligibility. VA Form 10-10EZ also was void of any pertinent details. The medical problem list from VA community partner Pebble Creek Medical Group in 2023 showed diagnoses PTSD and Depression. No encounter details were available for review. In the ABCMR application, the applicant claimed PTSD and sexual assault/harassment without any details. The 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance, were considered. The applicant has been diagnosed with PTSD. And as per ARBA policy, his self-assertion of sexual assault/harassment (presumed to be related to his military service) is sufficient for consideration for discharge upgrade. Based on records available for review, there is insufficient evidence to support that the applicant had conditions which failed medical retention standards of AR 40-501 chapter 3.

4. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant has been diagnosed with PTSD and has self-asserted MST. Both are mitigating conditions/experiences.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant has been diagnosed with PTSD; and his self-asserts MST.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, in part. The AWOL offences and failure to obey a lawful order offence, are mitigated by the applicant's PTSD/MST behavioral health condition. The physical assault on the two other soldiers and the attempt to sabotage three missiles are not mitigated.

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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct including being absent without leave and assault. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant provided no documentation to support his request, including post-service achievements or letters of reference to support clemency. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. 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:

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.

■

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 three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 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. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. 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.

b. Paragraph 3-7b states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable

or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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; traumatic brain injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. 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.

7. 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, 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//