

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 August 2024

DOCKET NUMBER: AR20230013636

APPLICANT REQUESTS:

- Upgrade of his undesirable discharge under other than honorable conditions
- Permission to appear personally before the Board, via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)

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, when he went AWOL (absent without leave), he was experiencing a mental health crisis; he remained absent for less than 35 days and, while absent, he attempted suicide due to the guilt he was feeling. He requires this upgrade so he can receive healthcare benefits.

a. Although the Army afforded him medical treatment, the applicant never received any type of mental health care; the Army only put him through the U.S. Army Retraining Brigade (USARB) and immediately court-martialed him.

b. The applicant has checked the block for "Other Mental Health" issue(s) but offers no further details or documentation.

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

a. On 5 November 1973, the applicant enlisted into the Regular Army for 3 years; he was 19 years old. At some point after the completion of initial entry training and the

award of military occupational specialty 76Y (Armorer/Unit Supply Specialist), orders assigned him to a supply and service battalion at Fort Campbell, KY. On a date prior to 24 May 1974, the applicant's unit promoted him to private (PV2)/E-2.

b. On 24 May 1974, the applicant's unit reported him as AWOL, but, on 31 May 1974, he surrendered himself at his unit, returning to military control. On 7 June 1974, the applicant left his unit again in an AWOL status, and his unit dropped him from its rolls.

c. On 10 July 1974, after being arrested by civil authority, the applicant returned to military control and was transferred back to his Fort Campbell unit. On 6 August 1974, and consistent with his pleas, a special court-martial found the applicant guilty for two specifications of AWOL (Article 86, Uniform Code of Military Justice (UCMJ)); the respective AWOL periods were 24 to 31 May 1974 (7 days) and 7 June to 10 July 1974 (33 days).

(1) The court sentenced the applicant to 2-months' confinement and forfeiture of \$50 per month for 2 months; the applicant was immediately remanded to confinement.

(2) On 10 September 1974, the special court-martial convening authority approved the applicant's sentence and ordered its execution; (per Article 58a (Sentences: Reduction in Enlisted Grade upon Approval), UCMJ, Soldiers sentenced to confinement were reduced to private (PV1)/E-1 immediately following the convening authority's approval of the sentence). On an unknown subsequent date, the applicant transferred to USARB at Fort Riley, KS.

d. On 25 September 1974, USARB released the applicant from confinement and placed him in a present for duty status. On 7 October 1974, reassignment instructions ordered the applicant to report to the replacement company at Fort Lewis, WA not later than 24 October 1974; on 11 October 1974, the applicant departed Fort Riley on ordinary leave.

e. On 25 October 1974, the Fort Lewis replacement company reported the applicant as AWOL, and, effective 24 November 1974, dropped him from unit rolls. On 4 December 1974, the applicant surrendered himself to the military police at Fort Campbell, and orders reassigned him to the U.S. Army Personnel Control Facility (PCF), Fort Campbell.

f. On 12 December 1974, the PCF preferred court-martial charged against the applicant for having been AWOL from 24 October to 4 December 1974 (41 days). On 12 December 1974, after consulting with counsel, the applicant voluntarily requested discharge in-lieu of trial by court-martial under the provisions of chapter 10 (Discharge for the Good of the Service), Army Regulation (AR) 635-200 (Personnel Separations –

Enlisted Personnel). In his request, he affirmed no one had subjected him to coercion and counsel had advised him of the implications of his request; the applicant further acknowledged he was guilty of the charge. The applicant indicated his intent to submit statements in his own behalf, but any statements provided are unavailable for review.

g. On 13 December 1974, the PCF placed the applicant on excess leave, and he departed Fort Campbell that same date. On 23 December 1974, the separation authority approved the applicant's separation request and directed his undesirable discharge under other than honorable conditions discharge.

h. On 22 January 1975, the Army separated the applicant under other than honorable conditions. His DD Form 214 shows he completed 1 year, 1 months, and 8 days of his 3-year enlistment contract, with 41 days of lost time. The report additionally reflects the following:

- Item 6a (Grade, Rate, or Rank) and 6b (Pay Grade) – PV1/E-1
- Item 7 (Date of Rank) – 10 September 1974
- Item 9e (Authority and Reason) – chapter 10, AR 635-200; separation program designator (SPD) "KFS"
- Item 10 (Reenlistment (RE) Code) – RE-3B and RE-4
- Item 26 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – "DNA"

4. AR 15-185 (ABCMR), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

5. The ABCMR does not grant requests for upgraded characters of service solely to make someone eligible for benefits; however, in reaching its determination, the Board can consider the applicant's petition, his evidence and assertions, and his service record in accordance with the published equity, injustice, or clemency guidance.

6. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to honorable. He contends he experienced an undiagnosed mental health condition that mitigates his misconduct.

b. 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 5 November 1973.

- The applicant was AWOL from 24 to 31 May 1974 and again from 7 June 1974 to 10 July 1974, and he was found guilty by a special court-martial for these offenses. He was AWOL from 24 October to 4 December 1974 and had court-martial charges preferred against him. He consulted with an attorney and voluntarily requested discharge in-lieu of trial by court-martial under the provisions of chapter 10 (Discharge for the Good of the Service), Army Regulation (AR) 635-200.
- The applicant was discharged on 22 January 1975, and he was credited with 1 year, 1 month, and 8 days of active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he was experiencing a mental health crisis when he went AWOL, and he attempted suicide due to his feelings of guilt before turning himself in. The application did not include any medical or mental health documentation. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 discharge? Yes. The applicant asserts he had an undiagnosed mental health condition at the time of the misconduct. However, there was no documentation of a mental health history in the application or viewable in JLV.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. Avoidant behavior, such as going AWOL, can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Yet, the presence of misconduct is not sufficient evidence of a mitigating mental health condition during active service.

However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 her characterization of service. Upon review of the applicant's petition, available military record and medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.
2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the periods of AWOL. The Board noted, the applicant provided no post service accomplishments or character letters of support for the Board to weigh a clemency determination. The found the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year, 1 months, and 8 days of his 3-year enlistment contract, with 41 days of lost time. Additionally, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Based on the preponderance of evidence, the Board denied relief.
3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

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, 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. 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 1-9d (Honorable Discharge) stated an honorable discharge was a separation with honor. Separation authorities should condition the issuance of an honorable discharge on proper military behavior and proficient duty performance. A separation authority could characterize a Soldier's service as honorable based on conduct ratings of at least "Good"; efficiency ratings of at least "Fair"; the Soldier could not have any general courts-martial, and the regulation allowed no more than one special court-martial conviction.

b. Paragraph 1-9e (General Discharge). A general discharge was a separation from the Army under honorable conditions, where the Soldier's military record was not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 permitted a Soldier to request discharge for the good of the service when they had committed an offense or offenses which, under the UCMJ and the Manual for Courts-Martial, United States 1969 (Revised Edition), included a bad conduct or dishonorable discharge as a punishment. The Soldier could submit such a request at any time after court-martial charges were preferred. Once approved, an undesirable discharge was normally furnished, but the discharge authority could direct either an honorable or a general discharge, if warranted.

4. The Manual for Courts-Martial, in effect at the time, showed a punitive discharge was an available maximum punishment for violations of Article 86 (AWOL for more than 30 days).

5. AR 601-280 (Army Reenlistment Program), in effect at the time, stated:

a. Table 1-3 (Reenlistment Eligibility (RE) Codes for Reenlistment in the Regular Army) showed the following:

- RE-1 – Fully qualified for immediate reenlistment

- RE-3B – Not eligible for immediate reenlistment unless waiver consideration is permissible and is granted; this code applied to enlisted Soldiers with time lost during last period of service
- RE-4 – Not eligible for reenlistment; Nonwaivable disqualification

b. Table 2-3 (Persons Ineligible for Immediate Reenlistment) stated individuals discharged from their current term of service for the good of the service, under the provisions of chapter 10, AR 635-200, were ineligible for immediate reenlistment.

6. AR 635-5-1 (SPD), in effect at the time, stated Soldiers separated per chapter 10, AR 635-200, received an SPD of "KFS." The associated reason for separation was, "Conduct Triable by Court-Martial."

7. 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.

8. 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.

9. 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.

10. AR 15-185 (ABCMR), currently in effect, states:

a. The ABCMR decides cases on the evidence of record; it is not an investigative body.

(1) The ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary).

(2) The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

b. An applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

//NOTHING FOLLOWS//