

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 July 2024

DOCKET NUMBER: AR20230014140

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions (UOTHC) discharge
- a change to his separation program number (SPN)
- personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge), 12 October 1972
- Certificate of Relief from Disabilities, 8 January 1996
- Medical records from Sunny View Rehabilitation Hospital, undated
- Department of Veterans Affairs (VA) Form 10182 (Decision Review Request: Board Appeal (Notice of Disagreement)), 8 September 2023

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 his discharge was inequitable because it was based on one isolated incident in 47 months of service with no other adverse action. The applicant notes traumatic brain injury (TBI) as a condition related to his request.
3. The applicant enlisted in the Regular Army on 20 June 1967, for 3 years.
4. On 11 July 1967, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice, for being absent without leave (AWOL) from his unit on or about 4 July 1967 and did remain so absent until on or about 8 July 1967. His punishment included 14 days restriction and 7 days extra duty.

5. Special Court-Martial Order (SPCMO) Number 163, issued by U.S. Army Training Center, Infantry, Fort Dix, NJ on 15 September 1967, shows the applicant was found guilty of two specifications of being AWOL from his unit:

- on or about 3 August 1967 and did remain so absent until on or about 5 September 1967
- on or about 18 July 1967 and did remain so absent until on or about 25 July 1967

a. He was sentenced to confinement at hard labor for six months and forfeiture of \$60.00 pay per month for six months. The sentence was adjudged on 15 September 1967.

b. The convening authority approved and ordered the sentence duly executed. The portion of the sentence that provided for confinement at hard labor in excess of four months was suspended for six months, at which time unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

6. SPCMO Number 219, issued by U.S. Army Training Center, Infantry, Fort Dix, NJ on 7 December 1967, directed the unexecuted portion of the sentence to forfeiture of \$60.00 pay per month for six months suspended for six months, at which time unless sooner vacated, would be remitted without further action.

7. SPCMO Number 322, issued by U.S. Army Correctional Training Facility, Fort Riley, KS on 5 November 1968, directed all unexecuted portion of the sentence to forfeiture of pay pertaining to the applicant suspended until 3 January 1969, at which time unless sooner vacated, would be remitted without further action.

8. SPCMO Number 421, issued by U.S. Army Correctional Training Facility, Fort Riley, KS on 5 December 1968, directed effective 20 December 1968, all unexecuted portions of the sentence to confinement at hard labor and forfeiture of pay pertaining to the applicant remitted.

9. SPCMO Number 1669, issued by Headquarters Special Troops, Fort Dix, NJ on 12 June 1969, shows the applicant was found guilty of one specification of being AWOL from his unit on or about 14 January 1969 and did remain so absent until on or about 15 May 1969.

a. He was sentenced to confinement at hard labor for six months and forfeiture of \$73.00 pay per month for six months. The sentence was adjudged on 28 May 1969.

b. The convening authority approved the sentence on 12 June 1969 and ordered only so much of the sentence as provided for confinement at hard labor for 5 months and forfeiture of \$73.00 pay per month for 6 months.

10. SPCMO Number 1843, issued by Headquarters Special Troops, Fort Dix, NJ on 28 June 1969, directed effective 30 June 1969, the unexecuted portion of the sentence to confinement at hard labor suspended for 6 months, at which time unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

11. On 28 July 1972, the applicant underwent a complete mental status evaluation and medical examination as part of his consideration for discharge due to his misconduct. His mental status evaluation noted, he met retention standards, was mentally responsible, was able to distinguish right from wrong and adhere to the right and had the mental capacity to understand and participate in Board proceedings.

12. On that same date, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation 635-206 (Personnel Separations-Discharge-Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), by reason of lengthy AWOL.

13. On 1 August 1972:

a. The applicant acknowledged receipt of his commander's notification, consulted with counsel, and was advised of the basis for his contemplated separation, its effect, and the rights available to him. He understood he may be deprived of many rights and benefits as a Veteran under both Federal and State laws, and he may encounter substantial prejudice in civilian life if he were issued a UOTHC discharge.

b. Court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL from on or about:

- 1 July 1969 and did remain so absent until on or about 12 January 1971
- 10 February 1971 and did remain so absent until on or about 15 July 1972

14. The applicant's immediate and intermediate commanders recommended his separation from the service, under the provisions of Army Regulation 635-206 and further recommended the issuance of an Undesirable Discharge Certificate.

15. On 13 September 1972, the separation authority approved the recommended discharge and directed the issuance of an Undesirable Discharge Certificate and reduction to the lowest enlisted grade.

16. The applicant was discharged on 12 October 1972, in the grade of E-1, under the provisions of Army Regulation 635-206, with SPN "283" by reason of Misconduct/AWOL. His service was characterized as UOTHC, and he was assigned

reenlistment code "RE-4." He was credited with 1 year, 10 months, and 27 days of net active service. His DD Form 214 contains the following additional entries:

- Item 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized) – National Defense Service Medal
- Item 26a (Non-Pay Periods Time Lost):
  - 14 January 1969 thru 23 June 1969
  - 1 July 1969 thru 11 January 1971
  - 10 February 1971 thru 14 July 1972

17. The applicant provides the following documents, which are available in their entirety for the Board's review within the supporting documents:

a. A Certificate of Relief from Disabilities shows that on 8 January 1996, a Judge granted him relief from all enumerated disabilities and bars to employment automatically imposed by law by reason of his felony DWI (driving while intoxicated) conviction.

b. Medical records from [REDACTED] Rehabilitation Hospital, [REDACTED] showing TBI as a reason for admission/chief complaint.

c. VA Form 10182 showing he appealed a denial of b benefits by the Veterans Health Administration due to his undesirable discharge.

18. Regulatory guidance in effect at the time provided the service of Soldier's separated by reason of AWOL under the provisions of Army Regulation 635-206, would normally be furnished an Undesirable Discharge Certificate. Additionally, the established SPN code for Soldiers separated under this authority and for this reason is "283."

19. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

20. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge and a change to his separation program number (SPN). He contends a TBI mitigates his discharge.

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 20 June 1967.

- On 11 July 1967, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice, for being absent without leave (AWOL) from his unit on or about 4 July 1967 and did remain so absent until on or about 8 July 1967. His punishment included 14 days restriction and 7 days extra duty.
- Special Court-Martial Order (SPCMO) Number 163, issued by U.S. Army Training Center, Infantry, Fort Dix, NJ on 15 September 1967, shows the applicant was found guilty of two specifications of being AWOL from his unit:
  - on or about 3 August 1967 and did remain so absent until on or about 5 September 1967
  - on or about 18 July 1967 and did remain so absent until on or about 25 July 1967
- SPCMO Number 1669, issued by Headquarters Special Troops, Fort Dix, NJ on 12 June 1969, shows the applicant was found guilty of one specification of being AWOL from his unit on or about 14 January 1969 and did remain so absent until on or about 15 May 1969.
- On 28 July 1972, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation 635-206 (Personnel Separations-Discharge-Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), by reason of lengthy AWOL.
- On 1 August 1972 court-martial charges were preferred against the applicant. His DD Form 458 (Charge Sheet) shows he was charged with two specifications of being AWOL from on or about:
  - 1 July 1969 and did remain so absent until on or about 12 January 1971
  - 10 February 1971 and did remain so absent until on or about 15 July 1972
- The applicant was discharged on 12 October 1972, in the grade of E-1, under the provisions of Army Regulation 635-206, with SPN "283" by reason of Misconduct/AWOL. His service was characterized as UOTHC, and he was assigned reenlistment code "RE-4."

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, his "discharge was inequitable because it was based on one isolated incident in 47 months of service with no other adverse action". However, this is inconsistent with the available record which indicates the applicant received an Article 15 less than a month following his enlistment and was initially court-martialed within three months of enlistment.

d. Due to the period of service, no active-duty electronic medical records were available for review. Hardcopy documentation shows on 28 July 1972, the applicant underwent a mental status evaluation as part of the discharge process. The mental status evaluation, indicated the applicant had no significant mental illness, met retention standards, was mentally responsible, was able to distinguish right from wrong and

adhere to the right and had the mental capacity to understand and participate in Board proceedings.

e. The VA's Joint Legacy Viewer (JLV) does not have a record of the applicant and there is no evidence that he is service connected. The applicant submitted an undated medical note, showing TBI as the chief complaint following an injury. However, the note indicates the applicant was 58 years old on the date of the appointment. Given the applicant's date of birth is 9 February 1949, this appointment occurred in 2007 which is 35 years post-military service.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is no evidence to support the applicant had a condition during military service that mitigates his misconduct.

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? No. There is no medical documentation indicating the applicant was diagnosed with a TBI during military service, nor does he provide a rationale of how or when a TBI would have occurred during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating condition. There is no evidence of any in-service diagnoses, the VA has not service-connected the applicant for any condition, and there is no VA electronic record indicating he has been treated for a service-connected TBI. The applicant provides an undated medical note from a hospital that indicates he was seen for an assessment following a fall. The medical note indicates the applicant was 58 years of age on the date of the assessment, given his date of birth is 9 February 1949, the applicant's TBI occurred in 2007 and would not provide mitigation for his misconduct.

h. Per Liberal Consideration guidelines, the applicant's selection of TBI on his application as related to his request warrants consideration by the Board.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the pattern of misconduct leading to the applicant's separation and the findings of a lack of mitigation for the misconduct in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's record.

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.

1/7/2025

X

CHAIRPERSON

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, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
3. Army Regulation 15-185 (ABCMR) states 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 635-5 (Personnel Separations - Separation Documents), in effect at the time, prescribed the separation documents that were prepared for individuals upon retirement, discharge, or release from active military service or control of the Army. It established standardized policy for preparing and distributing DD Form 214. Appendix A (SPN and Authority Governing Separations), states that the SPN code "283" is the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-206, Section VII by reason of Misconduct/AWOL, trail waiver or deemed in advisable.
5. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides that:
  - a. 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. 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.
6. Army Regulation 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct. Section VII, paragraph 45 (Discharge



by reason of desertion or AWOL) provides that an individual may be considered for discharge when, it is determined by an administrative review of all facts that there is substantial evidence to support a determination of desertion or AWOL; the unauthorized absence has continued for more than 1 year; retention in the service is precluded by regulations or is not considered desirable or in the best interests of the United States; trial by court-martial on a charge of desertion or AWOL is waived or deemed inadvisable by the general court-martial convening authority. An individual discharged by reason of desertion or AWOL was normally furnished an Undesirable Discharge Certificate, except that an Honorable or General Discharge Certificate may be furnished if warranted by the particular circumstances in a given case.

7. 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; TBI; 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.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses

or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//