

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 July 2024

DOCKET NUMBER: AR20230014598

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (General) discharge
- removal of derogatory information from his service records

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) medical progress notes

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 service was exemplary, until he was transferred to a different unit in his second year of service. He had personal issues with his new leadership. He was constantly harassed and given an Article 15 by the command. He accepted an expeditious discharge which accelerated his discharge by a year and half.
3. On his DD Form 149, the applicant notes other mental health issues are related to his request.
4. The applicant enlisted in the Regular Army on 16 August 1974, for 4 years. Upon completion of training, he was awarded military occupational specialty 16R (Short Range Air Defense Artillery Crewman). The highest grade he attained was E-4.
5. On 1 October 1975, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice, for absenting himself from his appointed place of duty, on or about 18 September 1975; and disobeying a lawful order from his platoon sergeant, on or about 18 September 1975. His punishment included forfeiture of \$50.00, reduction to E-1, and 14 days extra duty and restriction.

6. The applicant's commander notified the applicant on 5 January 1977, that he was initiating actions to separate him from service under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 5, by reason of Expeditious Discharge Program (EDP). As the specific reason, the commander cited the applicant's poor attitude, lack of motivation, lack of self-discipline, failure to demonstrate promotion potential, and quitter attitude. Additionally, the commander noted the applicant had been counseled four times concerning his deficiencies and his Article 15.

7. The applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him. He voluntarily consented to the proposed discharge action and declined to submit a statement in his own behalf.

8. The applicant's commander formally recommended the applicant's expeditious discharge.

9. The separation authority approved the recommended action and directed the issuance of a General Discharge Certificate.

10. The applicant was discharged on 10 February 1977. His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, paragraph 5-37, with Separation Program Designator JGH (failure to demonstrate promotion potential, EDP). He was assigned and Reentry Code 3. His service was characterized as under honorable conditions (General). He completed 2 years, 5 months, and 25 days of active service with 9 days of lost time.

11. The applicant provides VA medical progress notes that show he has been diagnosed and received treatment for various illnesses and injuries to include depression, migraine headaches and neuropathy. These notes are provided in their entirety for the Board's review within the supporting documents.

12. 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.

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he experienced mental health conditions that mitigate his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 16 August 1974; 2) On 1 October 1975, the applicant accepted non-judicial

punishment for absenting himself from his appointed place of duty and disobeying a lawful order from his platoon sergeant on 18 September 1975; 3) The applicant's commander notified the applicant on 5 January 1977, that he was initiating actions to separate him from service under the provisions of Expeditious Discharge Program (EDP). As the specific reason, the commander cited the applicant's poor attitude, lack of motivation, lack of self-discipline, failure to demonstrate promotion potential, and quitter attitude. Additionally, the commander noted the applicant had been counseled four times concerning his deficiencies and his Article 15; 4) The applicant was discharged on 10 February 1977. Chapter 5-37, with Separation Program Designator JGH (failure to demonstrate promotion potential, EDP). He was assigned and Reentry Code 3. His service was characterized as under honorable conditions (general).

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) and VA documentation provided by the applicant were also examined.

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder while on active service.

d. A review of JLV provided evidence the applicant has been engaged with the VA since 1998 predominately for physical concerns. He was diagnosed in 2009 with depression and insomnia related to his current physical concerns and living situation. There is insufficient evidence the applicant has been diagnosed with a service-connected mental health condition. The applicant does receive service-connected disability, but he does not receive any disability related to a mental health condition.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced mental health conditions which mitigates his misconduct. In 2009, the applicant was diagnosed with depression and insomnia related to his current physical concerns and living situation.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions that mitigates his misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did engage in avoidant/erratic misconduct, which could be a natural sequelae to some mental health conditions. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates 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 his characterization of service. Upon review of the applicant's petition and available military records, the Board found no error or injustice existed to warrant an upgrade to honorable. The applicant provided no evidence of post-service achievements or letters in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the characterization of service the applicant received upon separation was not in error or unjust.

2. The Board found the applicant's service record exhibits numerous instances of unsatisfactory job performance and conduct. Evidence shows he failed to meet the standards required to be a productive member of the United States Army. The applicant accepted nonjudicial punishment and was discharged under the Expeditious Discharge Program. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an honorable characterization of service. The Board reviewed and concurred with the medical advisor's reviewing finding insufficient evidence beyond self-report the applicant experienced a mental health condition while on active service.

3. Additionally, the Board noted the applicant's annotation on his application in the category of performance/evaluations/derogatory information. The Board determined the nonjudicial punishment included in the applicant's service record is an accurate representation of the circumstances as they existed at the time. The Board also determined the applicant did not demonstrate by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant and by a preponderance

of evidence that the contents of the nonjudicial punishment are substantially incorrect and support removal and denied relief.

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.

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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. 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. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JGH" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, for failure to maintain acceptable standards for retention, EDP.
4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided 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. Paragraph 5-37 provided for the discharge of enlisted personnel whose performance of duty, acceptability for the Service, and potential for continued effective service fall below the standards required for enlisted personnel in the Army because of the existence of one or more of the following conditions: enlisted personnel who fail to be advanced to the grade of E-2 after 4 months of active duty, or enlisted personnel who fail to demonstrate potential to justify advancement to the grade of E-3. The philosophy of this policy is that commanders will be able to anticipate and preclude the development of conditions which clearly indicate that Soldiers concerned are becoming

problems to an extent likely to lead to board or punitive action which could result in their separation under conditions which would stigmatize them in the future.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (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. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the 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.

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//