

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230014789

APPLICANT REQUESTS:

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

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

- DD Form 149 (Application for Correction of Military Record)
- In-service medical document
- Department of Veterans Affairs (VA) decision letter
- Army Discharge Review Board (ADRB) decision letter
- 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 he was suffering from post-traumatic stress disorder (PTSD), which resulted in an incident of military sexual trauma (MST) at his first duty station. During his time in service there was no safe way to report what had happened to him.
3. On 3 August 1972, the applicant enlisted in the Regular Army.
4. On 6 April 1973, the applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go to his appointed place of duty, on or about 4 April 1973.
5. Before a special court-martial on 28 September 1973, at Frankfurt, Germany, the applicant was found guilty of two specifications of absenting himself from his official place of duty; two specifications of failing to go to his appointed place of duty; four

specifications of disobeying a lawful command from a superior commissioned officer; three specifications of disobeying a lawful order from a superior noncommissioned officer; and one specification of leaving his post without being properly relieved. The court sentenced him to confinement at hard labor for 75 days, forfeiture of \$150.00 pay per month for 4 months, and reduction in grade to E-1. The sentence was approved on 29 October 1973, but the execution of so much thereof in excess of confinement at hard labor for two months, and forfeiture of \$150.00 pay per month for two months, was ordered to be duly executed.

7. On 11 April 1974, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go to his appointed place of duty, on or about 5 April 1974; disobeying a lawful order from his superior noncommissioned officer, on or about 7 April 1974; and failing to clean his weapon, on or about 7 April 1974. H

8. On 12 August 1974, the applicant accepted NJP under Article 15 of the UCMJ, for failing to obey a lawful regulation by having a folding knife of more than 2.5 inches long in his possession, on or about 28 July 1974.

9. On 15 September 1974, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from his superior commissioned officer, on or about 6 September 1974.

10. On 19 April 1975, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from a superior commissioned officer, on or about 19 April 1975.

11. On 29 April 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go to his appointed place of duty, on or about 22 April 1975. His punishment included reduction to E-2, forfeiture of \$75.00 for one month, 14 days extra duty and seven days restriction.

12. On 16 May 1975, the applicant accepted NJP under Article 15 of the UCMJ, for possessing marijuana, on or about 18 March 1975; and failing to obey a lawful regulation by having a knife in excess of 3 inches length in his possession, on or about 18 March 1975.

13. On 12 June 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go to his appointed place of duty, on or about 12 June 1975. His punishment included forfeiture of \$50.00 pay for one month.

14. The applicant's commander notified the applicant on 14 July 1975, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 13, for unfitness. As the specific

reasons, his commander noted the applicant's substandard duty performance as a Soldier, frequent use of marijuana, and multiple NJPs.

15. On 17 July 1975, 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 requested consideration of his case by a board of officers and representation by counsel. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions were issued to him. He acknowledged he understood that, as the result of issuance of an undesirable discharge UOTHC, he may be ineligible for many or all benefits as a Veteran under both Federal and State laws. He declined to submit a statement in his own behalf.

16. On 17 July 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go to his appointed place of duty, on three occasions. His punishment included forfeiture of \$85.00 for one month and reduction to E-2.

17. Before a summary court-martial on 5 September 1975, at Fort Campbell, KY, the applicant was found guilty of one specification of failing to go to his appointed place of duty; two specifications of disobeying a lawful order from his superior noncommissioned officer; and one specification of wrongfully using reproachful words towards a Soldier. The court sentenced him to reduction in grade to E-1, forfeiture of \$200.00 pay, and 30 days restriction. The sentence was approved on 10 September 1973.

18. The applicant's record is void of the separation authority's memorandum approving the applicant's discharge under the provisions of Army Regulation 635-200, Chapter 13.

19. The applicant was discharged on 21 October 1975. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 13-5a(1) and 13-17e. His service was characterized as UOTHC. He was assigned Separation Program Designator code JLB (Discreditable Incidents - Civilian or Military) and Reentry Code 4. He completed 3 years and 11 days of active service this period with 69 days of lost time.

20. The applicant petitioned the ADRB requesting upgrade of his UOTHC discharge. On 12 October 1976, the Board voted to deny relief and determined he was properly discharged.

21. The applicant provides a VA decision letter with supporting medical documents that show he was granted service connection for treatment purposes only, for PTSD. This letter is provided in its entirety for the Board's review within the supporting documents.

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

23. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable. He contends he experienced Posttraumatic Stress Disorder (PTSD) as a result of Military Sexual Assault (MST) that mitigates 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 (RA) on 03 August 1972 as a Field Artillery Crewman, 2) on 28 September 1973 the applicant was found guilty before a special court-martial of two specifications of absenting himself from his official place of duty, two specifications of failing to go to his appointed place of duty, four specifications of disobeying a lawful order from a superior commissioned officer, three specifications of disobeying a lawful order from a superior noncommissioned officer, and one specification of leaving his post without being properly relieved, 3) between 06 April 1973 and 17 July 1975 the applicant received nine Article 15s for the following reasons: failure to go to his appointed place of duty, disobeying a lawful order from his noncommissioned officer (NCO), failing to clean his weapon, failing to obey a lawful regulation by having a folding knife of more than 2.5 inches long in his possession, failing to obey a lawful regulation by having a knife in excess of 3 inches in length in his possession, and possession of marijuana 4) on 14 July 1975 the applicant's commander notified the applicant of his intention to separate him under AR 635-200, Chapter 13 for unfitness. The specific reasons noted were substandard duty performance, frequent use of marijuana, and multiple instances of nonjudicial punishment. The applicant's record is void of the separation authority's memorandum approving the applicant's discharge, 5) on 05 September 1975 before a summary court-martial the applicant was found guilty of one specification of failing to go to his appointed place of duty, two specifications of disobeying a lawful order from his NCO, and one specification of wrongfully using reproachful words towards a Soldier, 6) The applicant was discharged on 21 October 1975 under the provisions of Army Regulation (AR) 635-200, paragraph 13-5a(1) and 13-17e. 6) the applicant petitioned the ADRB requesting an upgrade of his UOTHC discharge and on 12 October 1976 the Board voted to deny relief and determined he was properly discharged.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. There was no record of the applicant in JLV and no VA medical records were available for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. A Report of Medical Examination for enlistment dated 02 August 1972 documented item number 42, psychiatric, as 'normal' on clinical evaluation. His enlistment Report of Medical History dated 02 August 1972 documented the applicant endorsed having previous problems with vision in both eyes, ear, nose or throat trouble, and VD-(Syphilis, gonorrhea, etc.). He documented his health at the time as 'fair.' The applicant's Report of Medical History dated 23 June 1975 completed as part of his Chapter 13 indicated he marked problems with the following: eye trouble, stomach, liver, or intestinal trouble, rupture/hernia (documented as occurring at age 13), bed wetting since age 12 (enuresis until one year ago), VD- (Syphilis, gonorrhea, etc.), and foot trouble. An in-service health record Standard Form (SF) 600 documented the applicant presented to medical for hemorrhoids on 17 August 1973 and 26 April 1974. A self-reported Medical History form dated 18 January 1974 documented the applicant marked 'no' to any drug or alcohol problem. The applicant's medical record as documented on SF 600's shows the applicant was treated for sexually transmitted infections (STI) on several occasions between on 09 March 1973 and 04 November 1974. He reported to the doctor on 23 April 1973 with a problem of urinary urgency and frequency since entering the Army. The provider noted the applicant had a 'questionable urinary problem.' The records show the applicant presented for drug use on 07 June 1973 noted as heroin, cocaine, amphetamines, and hashish. It was noted the applicant had turned himself in, had not used any substances for at least two days and denied experiencing withdrawal symptoms. He was referred for urine [illegible word] and follow-up. In February 1974, the applicant was evaluated for bed wetting that had been occurring for six months. A note dated 02 April 1975 documented the applicant presented to the emergency room (ER) for treatment due to a laceration on his finger. It was noted that the applicant became 'hostile' towards one of the staff members and decided to leave.

d. A Department of Veterans Affairs rating decision letter dated 13 June 2023 documented that the applicant was service-connected for treatment purposes only for PTSD. The applicant underwent a Compensation and Pension (C&P) examination on 07 March 2023. The applicant was diagnosed with PTSD and noted in the comments section that the applicant was diagnosed with PTSD due to MST on 24 April 2015. The provider documented that the assault occurred while the applicant was stationed in Germany. Per the applicant's service record, he was stationed in Germany from 19 December 1972 to 28 September 1973.

e. The applicant is applying to the ABCMR requesting an upgrade of UOTHC characterization of service to honorable. He contends he experienced PTSD as a result of MST that occurred at his first duty station and mitigates his misconduct. The available records were void of any in-service BH diagnoses or treatment. Since his discharge, the applicant was awarded service-connection through the VA for treatment purposes only for PTSD due to MST that occurred while he was stationed in Germany.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant is service-connected for treatment purposes only through the VA for PTSD due to MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is service-connected for treatment purposes only through the VA for PTSD due to MST. Service connection establishes that the condition existed during service.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially. The applicant's in-service treatment record was void of any BH diagnosis or treatment. Since his discharge from the military, the applicant has been service-connected for treatment purposes only through the VA for PTSD due to MST when he was stationed in Germany. Although the specific date of the assault is not documented in the available documentation, the applicant's service records show he was stationed in Germany on 19 December 1972. Review of his service record is void of any misconduct prior to his assignment to Germany. As there is an association between MST and PTSD with difficulty with authority figures, avoidance behavior, and self-medicating with substances, there is a nexus between the applicant's PTSD diagnosis secondary to MST and his offenses of failure to report, disobeying a lawful order, and possession of marijuana. However, failing to obey a regulation by carrying a knife over a length of 2.5 and 3 inches is not in keeping with the natural history and sequelae of PTSD and MST as PTSD and MST do not interfere with one's ability to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is partially supported.

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 under honorable conditions (General). 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 on several occasions and was discharged for unfitness. The Board reviewed and noted the medical advisor's review; however, determined he did not meet the standards of acceptable conduct and performance of duty for Army personnel. Therefore, 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.

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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. Section 1556 of Title 10, U.S. Code, 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 635-200 sets forth the requirements for the administrative 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. 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 13 provided procedures and guidance for eliminating personnel found to be unfit or unsuitable for further military service. Action will be taken to separate an individual for unfitness when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier, further effort is unlikely to succeed. Action will be taken to separate an individual for unsuitability when it is clearly established that it is unlikely that he will develop sufficiently to participate in further military training and/or become a satisfactory Soldier.

4. 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 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.

5. 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.

6. 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//