

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 August 2024

DOCKET NUMBER: AR20230014800

APPLICANT REQUESTS: Reconsideration of his previous requests for upgrade of his under other than honorable conditions (UOTHC) discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers:

- AR20120007894 on 1 November 2012
- AR20130010595 on 27 June 2013
- AR20140000720 on 20 February 2014
- AR20140015460 on 30 September 2014
- AR20180001196 on 26 July 2019
- AR20190015135 on 24 February 2021

2. The applicant states during his tour of duty, he had gotten married at a very young age. During his leave, he found his wife in bed with another man. He couldn't think clearly, and admits to his actions. He would reenlist if he could.

3. On 21 December 1973, the applicant enlisted in the Regular Army, for 3 years. Upon completion of training, he was awarded military occupational specialty 05E (Radio Operator). The highest grade he attained was E-3.

4. On 30 September 1974, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go at the time prescribed to his appointed place of duty, on or about 29 August 1974; and disobeying a lawful order issued by an officer, on or about 29 August 1974. His punishment included forfeiture of \$50.00 pay for one month and seven days extra duty.

5. On 13 November 1974, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful order from his superior noncommissioned officer, on or about 29 October 1974 and on or about 31 October 1974; and failing to go at the time prescribed to his appointed place of duty, on or about 2 November 1974. His punishment included forfeiture of \$40.00 and seven days extra duty.
6. On 22 January 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 10 January 1975, and on or about 13 January 1975. His punishment included forfeiture of \$50.00 and 14 days extra duty.
7. On 27 March 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 30 January 1975. His punishment included reduction to E-2 and seven days confinement.
8. On 17 April 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 14 April 1975. His punishment included forfeiture of \$50.00 and 14 days extra duty.
9. On 26 June 1975, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 16 June 1975, and on or about 17 June 1975. His punishment included reduction to E-1 and 14 days extra duty.
10. On 8 August 1975, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 12 August 1975.
11. On 13 August 1975, the applicant accepted NJP under Article 15 of the UCMJ, for going AWOL. His punishment included forfeiture of \$75.00 pay and seven days confinement.
12. On 2 February 1976, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 28 January 1976. His punishment included forfeiture of \$50.00 and seven days restriction and extra duty.
13. On 30 June 1976, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful command from his superior commissioned officer. His punishment included reduction to E-2, forfeiture of \$93.00 pay, and 14 days restriction and extra duty.

14. On 12 July 1976, the applicant underwent a medical examination. He was deemed medically qualified for administrative separation.

15. On 15 July 1976, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

16. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, a letter, subject: Reason/Authority for Separation, shows the applicant was informed he could receive a document indicating the narrative reason for separation, a narrative description of the regulatory authority for separation and the reenlistment code. The applicant declined, but did request a copy of his DD Form 214 (Report of Separation from Active Duty).

17. The applicant was discharged on 17 September 1976. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 13-5a(1). His service was characterized as UOTHC. He was assigned Separation Program Designator JKA (discreditable incidents – civilian or military) and Reenlistment Code 3B. He completed 2 years, 8 months, and 25 days of net active service this period with 2 days of lost time.

18. The applicant petitioned the ABCMR numerous times between April 2012 through November 2019, for consideration of his request for upgrade of his UOTHC discharge. On 1 October 2000, the Board again voted to deny relief and determined that the overall merits of his case were insufficient as a basis to amend the decision of the ABCMR.

19. 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.

20. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous requests for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends in this request that 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 21 December 1973; 2) The applicant accepted multiple non-judicial punishments (NJP) between August 1974 and June 1976 for various types of misconduct to include: failing to be on time, disobeying orders, and being AWOL from 8-12 August 1975; 3) The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing; 3) The applicant was discharged on 17 September 1976, Chapter

13-5a(1). He was assigned Separation Program Designator JKA (discreditable incidents – civilian or military), and his service was characterized as UOTHC.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

c. The applicant asserts he experienced mental health conditions that mitigate his misconduct while on active service. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. On 15 July 1976, the applicant underwent a mental status evaluation. He was not diagnosed with a mental health condition and psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

d. A review of JLV was void of any health information in regard to the applicant, and he did not provide any additional medical documentation to review.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence beyond self-report the applicant was experiencing a mitigating mental health condition or experience while on active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge beyond his history of misconduct to provide an appropriate opinion on possible mitigation as the result of a mental health condition or experience.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? No. There is insufficient evidence beyond self-report the applicant was experiencing a mitigating mental health condition or experience while on active service. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge beyond his history of misconduct to provide an appropriate opinion on possible mitigation as the result of a mental health condition or experience. While there can be a nexus erratic and avoidant behavior similar to the applicant's misconduct, the presence of misconduct is not sufficient evidence of a mental health condition. However, the applicant contends he experienced mental health condition while on active service, which mitigates his discharge. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

(2) Did the condition exist or experience occur during military service? N/A.

(3) Does the condition experience actually excuse or mitigate the misconduct? N/A.

OARD DISCUSSION:

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 DoD guidance for liberal consideration of discharge upgrade requests. The applicant's separation packet is not available for review. However, other evidence (DD Form 214) shows he was discharged on 17 September 1976 under the provisions of AR 635-200 paragraph 13-5a(1), due to misconduct - discreditable incidents – civilian or military. His service was characterized as under other than honorable conditions. The Board found no error or injustice in his available separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination that based on the available information, there is insufficient evidence beyond self-report the applicant was experiencing a mitigating mental health condition or experience while on active service. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference in support of a clemency determination. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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 to amend the decision of the ABCMR set forth in Dockets Number:

- AR20120007894 on 1 November 2012
- AR20130010595 on 27 June 2013
- AR20140000720 on 20 February 2014
- AR20140015460 on 30 September 2014
- AR20180001196 on 26 July 2019
- AR20190015135 on 24 February 20212.

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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. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.
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/Naval 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.

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//