

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 October 2024

DOCKET NUMBER: AR20230014948

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) characterization of service to honorable
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- General Discharge Certificate
- Letter of Congratulations from a Brigadier General

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 young, at the time he served, and he was in a different frame of mind that was tainted with "hippy" ideology. He has become a Christian believer. He has worked, been married, and widowed twice, and he completely honors God and country. Had he been in the correct frame of mind, he would have served in a much more honorable fashion. He does not believe that he suffered an "injustice," but he is a totally different person. He is 71 years of age, and he would be grateful to have his discharge upgraded. He also annotated his application to show that he suffers from "other mental health conditions."
3. Prior to joining the military, at age 17, on 9 May 1970, the applicant was charged with possession of alcohol by a minor. Adjudication was withheld, he was placed on good behavior for 6 months, and the case was dismissed on 23 November 1970.

At age 18, on 9 January 1971, he was charged with presenting false identification to buy beer. He appears to have been placed on bond and was given a fine.

4. On 2 June 1971, at age 18, the applicant was issued an approved moral waiver to enter the Army of the United States (AUS), provided he was otherwise qualified.
5. On 29 June 1971, at age 18, the applicant was inducted into the AUS. He completed the training requirements, and he was awarded military occupational specialty 05B (Radio Operator). On 15 December 1971, he was assigned to Germany.
6. On 16 March 1972, he accepted nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), for being derelict in the performance of his duty, in that he failed to return to mop the mess hall and then return to his normal duty area. His punishment consisted of 7 days of extra duty.
7. The applicant was counseled by his chain of command on the following dates:
  - a. In November 1971, he was counseled by a first lieutenant (1LT) and staff sergeant (SSG) for a lack of cooperation; the applicant claimed he was being harassed.
  - b. In March 1972, he was counseled by a captain (CPT), for being unwilling to cooperate; he stated his supervisors continuously harassed him.
  - c. Between March and November 1972, he was counseled by a CPT, 1SG, and a SSG, for insubordination toward the SSG, and for inciting other Soldiers in the section not to work, he was becoming more hostile towards the military and the military environment, and he was doing no work.
  - d. Between November and December 1972, he was counseled by a CPT and the 1SG, for not being present for duty and using a military Jeep for personal reasons. His chain of command attempted to give him a sense of responsibility by becoming the commander's driver, which resulted in a negative response.
  - e. From December 1972 to the present, he was counseled by two CPT's, 1SG, and a sergeant, for shirking his duties, being AWOL (absent without leave) for 6 days, and for being recalcitrant. He had received a field grade Article 15, and he was being eliminated from the military under the provisions of Army Regulation (AR) 635-200 (Personnel Separations), paragraph 13-5b(3), [Apathy].
8. On 25 January 1973, the applicant's immediate commander notified him of the intent to initiate separation action against him in accordance with AR 635-200, paragraph 13-5b(3), (Apathy). The following actions had been taken in preparation of the case. He had been:

- flagged under the provisions of AR 600-31, on 23 January 1973
- referred to a medical facility, on 23 January 1973

9. On 1 February 1973, he received NJP under Article 15, UCMJ, for leaving his unit in an AWOL status from 23 to 31 January 1973. His punishment consisted of reduction from pay grade E-3 to pay grade E-1, a forfeiture of \$75 pay for 1 month, and 30 days in in correctional custody. On 9 February 1973, he appealed the punishment.

10. The Staff Judge Advocate considered the appeal in the above case and opined that the proceedings were conducted in accordance with law and regulation, but the punishment imposed was disproportionate to the offense committed. It appeared the applicant had no authority medical or otherwise to be absent from duty during the relevant timeframe. On 23 March 1973, the appeal was granted in part. The punishment of reduction in excess of pay grade E-2 was suspended for 90 days, at which time unless sooner vacated the suspended portion of the punishment would be remitted without further action.

11. On 27 February 1973, the applicant underwent a mental status evaluation at the commander's request. It was determined that his behavior was normal, he was fully alert, fully oriented, and his mood was level, his thinking process was clear, his thought content was normal, and his memory was good. The impression was no significant mental illness. He was mentally responsible, able to distinguish between right and wrong, adhere to the right, and he had the mental capacity to understand and participate in board proceedings. He also met retention standards under the provisions of chapter 3, AR 40-501 (Standards of Medical Fitness). He was cleared for administrative action deemed appropriate by his chain of command.

12. His service record contains a Standard Form 93 (Report of Medical History) that shows at the time of his examination, on 27 February 1973, he stated he was in good health, and he was taking no medication.

a. In item 9, he responded "yes," to have you ever bled excessively after an injury or tooth extraction, he stated, "extensive epistaxis pertaining to [a] punch in nose."

b. In item 11, he annotated this form to show he had the following abnormalities: Ear, nose, or throat trouble; head injury; pain or pressure in chest; chronic cough; adverse reaction to serum drug or medicine; broken bones; and painful or "trick" shoulder or elbow. He also indicated that he had been hospitalized at the 130th General Hospital, Nurnberg, Germany, for cellulitis in his right lower leg.

c. This form also contains notes showing:

- In item 11, he had chronic sinus trouble; cough, second-degree bronchitis; he was allergic to penicillin, he had a fractured left wrist at age 11, well-healed; and his right shoulder was “double-jointed,” dislocated and relocated easily
- In item 19, he was hospitalized in December 1972, at the 130th General Hospital, Nurnberg, Germany for cellulitis of the right leg and second-degree puncture wound; now well-healed

13. On 8 March 1973, the applicant's commander recommended the applicant's separation under the provisions of chapter 13-5b(3), AR 635-200 (Personnel Separations – Enlisted Personnel), due to unsuitability based on his lack of appropriate interest, defective attitude, and inability to expend effort constructively. He was advised of his rights and contemplated action; he requested consideration of his case by a board of officers. The commander also stated:

a. During the period 24 November 1971 to date, the applicant had been assigned to various duty assignments (four different sections) in the troop, commensurate with his training and ability and he served under different officers and noncommissioned officers. In each instance his performance of duty had been unsatisfactory. His military superiors and medical examiner agreed that further rehabilitative efforts would be useless. His assignments in the squadron are listed below:

- 24 November 1971 to 24 March 1972, to the Squadron Commander
- 25 March to 15 November 1972, to the Squadron Redeye
- 16 November to 1 December 1972, Headquarters, Headquarters Troop Orderly Room
- 2 December 1972 to present, to the Squadron S-4

b. His counseling, which is stated in paragraph 7 above.

c. Elimination for unfitness was not considered appropriate. His performance was characterized by habitual shirking of his duties.

d. A request for a waiver of a rehabilitative transfer was made in this case, it was believed the applicant would not rally under another commander. All transfers within the troop had been a sincere effort to help him overcome his immature attitude towards anything that represented the military environment. He would shirk any assigned duty unless he could derive something personal from it. He was a recalcitrant and lacked veracity. He was under medical treatment for a leg injury which was partially true, however, he extended those medical appointments to the extent that he was on an authorized sick call for his leg.

14. On 2 April 1973, the applicant was notified he was being considered for discharge for unsuitability under the provisions of chapter 13-5b(3), AR 635-200. The basis for this

action was defective attitude and inability to expend effort constructively. He was advised of his rights.

15. On 3 April 1973, a request was made for a board of officers to convene to consider the applicant's case.

16. On 6 April 1973, the Adjutant, Headquarters, 1st Armored Division Artillery, Germany, returned the separation action with specific instructions [corrective action], regarding statements being used to separate the applicant for apathy that contained remarks indicating he was a habitual shirker.

17. On 1 May 1973, he received NJP under Article 15, UCMJ, for leaving his unit in an AWOL status from 5 to 30 April 1973. His punishment consisted of reduction from pay grade E-3 to pay grade E-1, a forfeiture of \$100 pay for 2 months, and 30 days in in correctional custody. On 2 May 1973, the applicant appealed the punishment. As part of his appeal, he stated he went AWOL because he received personal threats from his chain of command. He also stated he had signed four different acknowledgements for apathy and an unsuitability discharge. He would accept a general discharge. Please consider that the Army just was not his way of life.

18. On 14 May 1973, the Staff Judge Advocate considered the appeal in the above NJP and opined that the proceedings were conducted in accordance with law and regulation, and the punishment imposed was neither unjust nor disproportionate to the offense committed.

19. On 16 May 1973, the request for waiver of a rehabilitative transfer was approved.

20. On 21 May 1973, Headquarters, 1st Armored Division returned the separation action to his unit, and stated the special court-martial authority would appoint a board of officers, because the unsuitability case required board action.

21. On 23 May 1973, he received NJP under Article 15, UCMJ, for leaving his unit in an AWOL status from 22 to 23 May 1973. His punishment consisted of reduction from pay grade E-2 to pay grade E-1 (suspended for 60 days), and 14 days of extra duty and restriction. He appealed the punishment, and it was denied on 25 May 1973.

22. On 1 June 1973, the applicant acknowledged he had been advised by consulting counsel of the basis for the contemplated action to separate him under the provisions of chapter 13, AR 635-200, for unsuitability. Additionally, he acknowledged he had been advised by consulting counsel and he:

- Understood the basis for the contemplated action to accomplish his separation for unsuitability and its effects

- Understood the rights available to him
- Waived consideration of his case by a board of officers
- Waived a personal appearance before a board of officers
- Declined to submit statements in his own behalf
- Waived further representation by military counsel
- Could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him

23. On 18 July 1973, the appropriate authority waived the requirement for a rehabilitative transfer and approved the applicant's separation under the provisions of chapter 13-5b(3), AR 635-200, due to unsuitability with a general discharge under honorable conditions. Additionally, the separation authority stated final action under Chapter 13, AR 635-200 was delayed, because the applicant had previously requested a board of officers. Upon appearing before the board of officers, he and his appointed defense counsel submitted a waiver of consideration before the board of officers.

24. Accordingly, on 9 August 1973, he was discharged. His DD Form 214 shows he completed 2 years and 10 days of net active service this period. His awards are listed as the National Defense Service Medal and Sharpshooter Marksmanship Qualification Badge M-16 (Rifle). It also shows in:

- Item 11c (Reason and Authority), AR 635-200, paragraph 15-5b3 (Should be paragraph 13-5(b)(3), "Separation Program Number 46 [Apathy]" and Reenlistment Code 3B
- Item 13a (Character of Service), Under Honorable Conditions
- Item 22c (Foreign and/or Sea Service), "1 year, 6 months, and 10 days"

25. The applicant submitted a letter from Brigadier General JBD congratulating the applicant on graduating from college and best wishes for much success in his job in Coral Gables, FL.

26. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicants do not have a right to a formal hearing [telephone or video] before the ABCMR. The Director of the ABCMR may grant such a hearing whenever justice requires.

27. Army Regulation 635-200 [1966-1 March 1978] sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally had met the standards of acceptable conduct

and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would have been clearly inappropriate.

b. Chapter 13 of the regulation in effect at the time established policy and provided procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service. It provided for the separation of individuals for unsuitability whose record evidenced apathy (lack of appropriate interest), defective attitudes, and an inability to expend effort constructively. When separation for unsuitability was warranted, an honorable or general discharge was issued as determined by the separation authority based upon the individual's entire record.

28. 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 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) On 29 June 1971, the applicant was inducted into the Army of the United States; 2) The applicant was counseled and received nonjudicial punishments for various misconduct to include being AWOL for 6 days during his enlistment; 3) The applicant was discharged on 9 August 1973, Separation Program Number 46 [Apathy]. His character of service was 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 and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he was experiencing mental health condition 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. On 27 February 1973, the applicant underwent a mental status evaluation at the commander's request. The applicant was not diagnosed with a mental health and also met retention standards under the provisions of chapter 3, AR 40-501. He was cleared for administrative action deemed appropriate by his chain of command.

d. A review of JLV provided insufficient evidence the applicant has ever been diagnosed with a mental health condition, and he does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Medical 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.

(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 or 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 go AWOL and engage in various types of misconduct, which could be avoidant and erratic behavior and 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 alone 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 warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for unsuitability with the commander citing a defective attitude and inability to expend effort constructively. The Board noted the applicant provided documentation to support his request, including his personal statement accepting responsibility of being young and foolish and a letter of reference to support clemency from a brigadier general. Additionally, the Board noted the applicant earned his degree in Industrial Technology in reference to his post-service achievements. The Board noted the applicant's contention of an other mental health issue/condition; however, concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that



mitigated his conduct. Based on a preponderance of the evidence, the Board concluded that an upgrade from under honorable conditions (General) to honorable was warranted.

2. 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 Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 9 August 1973 to show an honorable characterization of service.

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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. Army Regulation 635-200 [1966-1 March 1978] sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally had met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would have been clearly inappropriate.

b. Chapter 13 of the regulation in effect at the time established policy and provided procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service. It provided for the separation of individuals for unsuitability whose record evidenced apathy (lack of appropriate interest), defective attitudes, and an inability to expend effort constructively. When separation for unsuitability was warranted, an honorable or general discharge was issued as determined by the separation authority based upon the individual's entire record.

c. Chapter 15 at the time established policy and prescribed procedures for separating members for misconduct by reason of absence without leave or desertion. It stated an individual could be considered for discharge under this section when an administrative review determined there was substantial evidence to support a determination of desertion or absence without leave, the authorized absence was continuous for 1 year or longer, retention was undesirable, or a trial by court-martial was deemed inadvisable. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally appropriate for a Soldier discharged under this chapter.

3. 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.

4. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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. 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. 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.

6. Section 1556 of Title 10, United States Code, 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 applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//