

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 August 2024

DOCKET NUMBER: AR20230015079

APPLICANT REQUESTS: in effect, an upgrade of the deceased former service member's (SM's) under conditions other than honorable discharge to honorable. She also requests a personal appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Identification and Social Security cards
- Certificate of Birth
- Marriage Certificate
- Certificate of Death
- Photos of 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 the SM suffered from mental issues. He had a bad temper. He ended up with high blood pressure as he aged. He should be reinstated as an honorable discharge. The Army did not recognize his mental issues in order to address his coping mechanisms. He suffered from mental issues, he was penalized for bad behavior, yet the Army did nothing to help him overcome his mental problems. He contracted COVID-19 which led to his death. He did serve his country and should not have been penalized. The Army should have put him on sick leave to address his mental issues. He showed remorse for his behavior toward the officer. He had been depressed most of his life.
3. The SM enlisted in the Regular Army on 20 October 1967.

4. He received non-judicial punishment on 12 February 1968, for on or about 0001 hours, 2 February 1968, absenting himself from his unit and remaining so absent until on or about 9 February 1968.

5. On 7 August 1968, he was tried by a special court-martial (SPCM) and found guilty of three specifications of being absent without leave (AWOL):

- On or about 29 March 1968 until on or about 19 April 1968
- On or about 22 April 1968 until on or about 27 April 1968
- On or about 3 May 1968 until on or about 8 July 1968
- He was sentenced to confinement at hard labor for six months and forfeiture of \$65 per month for six months

6. On 12 August 1968, SPCM Order Number 2201 shows the sentence was approved and was duly executed.

7. SPCM Order Number 95, issued by US Army Correctional Training Facility, Fort Riley, KS, on 27 August 1968, shows all unexecuted portions of sentences to forfeitures were suspended until 18 October 1968, at which time, unless sooner vacated, the suspended portions of the sentences will be remitted without further action.

8. SPCM Order Number 230, issued by US Army Correctional Training Facility, Fort Riley, KS, on 8 October 1968, shows all unexecuted portions of sentences to confinement at hard labor and forfeitures were remitted.

9. On 5 December 1968 the SM underwent a physical examination for the purpose of separation under the provisions (UP) of Army Regulation (AR) 635-212 (Personnel Separations – Discharge for Unfitness or Unsuitability). He was found qualified for military service.

10. On 10 December 1968, he was tried by a SPCM and found guilty of being AWOL from on or about 13 November 1968 until on or about 25 November 1968. He was sentenced to confinement at hard labor for six months and forfeiture of \$72 per month for six months.

11. On 19 December 1968, SPCM Order Number 220, shows the sentence was approved and was duly executed. He was to be confined at the Post Stockade, Fort Leonard Wood, MO, and the confinement will be served therein or elsewhere, as competent authority may direct.

12. The complete facts surrounding the SM's discharge are not available in his service records. However, his DD Form 214 (Armed Forces of the United States Report of

Transferor Discharge) shows he was discharged under conditions other than honorable on 28 March 1969 UP of AR 635-212. He completed 7 months and 1 day net service this period.

13. The applicant provided photos of progress notes related to the SM's health in support of her claim. Also, the following documents were submitted to establish her relationship with the deceased SM:

- Identification and Social Security cards
- Certificate of Birth
- Marriage Certificate
- Certificate of Death

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

15. By regulation (AR 15-185 (ABCMR)), 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.

16. By regulation (AR 635-212), 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.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of the SM's other than honorable discharge. She contends he was experiencing mental health conditions while on active service 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 SM enlisted in the Regular Army on 20 October 1967; 2) On 7 August 1968, the SM was tried by a special court-martial and found guilty of three specifications of AWOL: 29 March-19 April 1968, 22-27 April 1968, 3 May-8 July 1968; 3) On 10 December 1968, the SM again was tried by a special court-martial and was found guilty of being AWOL from 13-25 November 1968; 4) The complete facts surrounding the SM's discharge are not present in his service records. However, his DD Form 214 shows he was discharged under conditions other than honorable on 28 March 1969 UP of AR 635-212. He completed 7 months and 1 day net service.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the available supporting documents and the SM's available military service and medical

records. The VA's Joint Legacy Viewer (JLV) and additional civilian medical documentation provided by the applicant were also examined.

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

d. A review of JLV was void of medical documentation. The applicant provided civilian medical documentation from 2022 that the SM had a past medical history of anxiety and depression. There was no information provided on the history of these conditions for the SM.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the SM had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the SM have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts the SM experienced mental health conditions which mitigate his misconduct. The applicant provided medical documentation that he had a medical history of depression and anxiety.

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

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond the applicant's statement that the SM was experiencing anxiety and depression, while he was on active service. The SM did go AWOL multiple times, which could be avoidant and a natural sequelae to depression and anxiety. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. However, the applicant contends the SM 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:

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. Based upon the short term of honorable service completed prior to a pattern of misconduct leading to the FSMs separation, as well as the lack of mitigation for the misconduct found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the FSM's characterization of service.

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.

3/6/2025

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. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 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.

3. AR 635-212 (Personnel Separations – Discharge for Unfitness or Unsuitability) then in effect, set forth the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. Paragraph 6b provided that an individual was subject to separation for unsuitability when one or more of the following conditions existed: (1) inaptitude; (2) character and behavior disorders; (3) apathy (lack of appropriate interest, defective attitudes, and inability to expend effort constructively); (4) alcoholism; (5) enuresis; and (6) homosexuality (Class III - evidenced homosexual tendencies, desires, or interest, but was without overt homosexual acts). 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. This same regulation provided that when the discharge was based on unfitness, frequent involvement in incidents of a discreditable nature with civil or military authorities, then Separation Program Number 28B would be used.

4. AR 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-9d (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an honorable discharge will be conditioned upon proper military behavior and proficient performance of duty during the member's current

enlistment of current period of service with due consideration for the member's age, length of service, grade, and general aptitude.

b. Paragraph 1-9e (General Discharge) states a general discharge is a separation from the Army under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an honorable 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 based on 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.

//NOTHING FOLLOWS//