

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 August 2024

DOCKET NUMBER: AR20240000612

APPLICANT REQUESTS: Reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge and the separation code.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Report of Separation from Active Duty)
- Character Letters (two)
- DVA Decision Letters (two)
- DVA Medical Documents
- Department of Veterans Affairs (DVA) Statement in Support of Claim

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 Number AR20210011641 on 16 March 2022.

2. The applicant states:

a. He again requests review of the support documentation he has provided. He wishes consideration of the fact that he is from a black family living in Mount Hope, AL. He is the second of 8 children. His goal was to help his mother as much as possible. He realizes now that he was a young kid when everything happened in Korea. He believes that he was set up, as the person who arrested him was also the person giving him the money to buy the items. He understands that this kind of thing happens even today. When given the option to either go for a court martial or take the easy way out both his commanding officer and first sergeant pushed for the easy way out. To this day he will always believe that because he is a southern black man, they found a way to get rid of him.

b. The applicant lists other mental health as related to his issue. He provides a DVA Statement in Support of Claim, dated 21 January 2022, in which he stated he feels the arrest was due to entrapment by law enforcement. He made a mistake in not going to

court martial, but they scared him with the prospect of prison time. (DVA Statement in Support of Claim available for review).

3. The applicant enlisted in the Regular Army on 11 May 1977. His military occupational specialty 76V (Storage Specialist).

4. The applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military justice (UCMJ) on 13 July 1977 for:

- without authority, being absent from his unit on or about 11 July 1977 until on or about 12 July 1977
- violating a lawful general regulation by purchasing goods for illegal transfer or production of income through sale, barter, or exchange (electronic equipment) on or about 30 May 1979
- failing to present, upon request of military law enforcement personnel or other authorized personnel acting in an official capacity, valid and bona fide information or documentation relating to continued possession or disposition of duty-free items requiring a Letter of Authorization Purchase Record/controlled Item purchase Record prior to purchase (electrical equipment on or about 31 May 1979
- his punishment consisted of forfeiture of \$74.00 pay for one month, restriction, and extra duty

5. The applicant served in Korea from 17 November 1978 through 11 September 1979.

6. Court-martial charges were preferred against the applicant on 3 July 1979, for violation of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with:

- violating a lawful general regulation by purchasing goods for illegal transfer or production of income through sale, barter, or exchange (electronic equipment) on or about 30 May 1979
- failing to present, upon request of military law enforcement personnel or other authorized personnel acting in an official capacity, valid and bona fide information or documentation relating to continued possession or disposition of duty-free items requiring a Letter of Authorization Purchase Record/controlled Item purchase Record prior to purchase (electrical equipment on or about 31 May 1979

7. The applicant's commander and chain of command recommended trial by general court-martial on 5 July 1979.

8. The applicant was notified on 31 July 1979 that the commander would investigate the facts and circumstances concerning the charges preferred against him.

9. The applicant consulted with legal counsel on 3 August 1979, and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge and the procedures and rights that were available to him.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separation-Enlisted Personnel), Chapter 10, in for the good of the service, lieu of trial by court-martial. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration (VA), and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an UOTHC discharge.

b. He elected to submit statements in his own behalf. The statement is not available for review.

10. The Staff Judge Advocate determined on 10 August 1979; the applicant's discharge was legally sufficient.

11. The applicant's immediate commander recommended disapproval of the discharge and his chain of command recommended approval with a discharge UOTHC.

12. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 16 August 1979 UOTHC and directed the applicant be reduced immediately to the lowest enlisted grade.

13. The Reason for Separation memorandum dated 12 September 1979 shows the applicant was not eligible for immediate reenlistment unless waiver consideration is permitted and granted.

14. The applicant was discharged on 12 September 1979. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service-in lieu of trial by court-martial with Separation Program Designator JFS and Reenlistment Code 3. His service was characterized as UOTHC. He completed 2 years, 4 months, and 2 days of net active service.

15. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

16. The applicant provides:

- a. A copy of his DD Form 214 as discussed above.
  - b. Character letters that attest to the applicant's work ethic, and being respected by owners and all other employees. He is known to be a very hard, dedicated helpful worker who is always friendly and happy. He is a caring and kind friend, of sound mind and moral character.
  - c. A DVA Decision letter, dated 18 October 2021 shows the applicant's service from 11 May 1977 to 12 September 1979 is not honorable for VA purposes. The applicant is entitled to health care for the period of service 11 May 1977 to September 1979 for any disabilities determined to be service connected, as he did not receive a bad conduct discharge.
  - d. A DVA Decision letter, dated 2 December 2021 shows the applicant's military service for the period of 11 May 1977 through 12 September 1979 is dishonorable for VA purposes.
  - e. A DVA medical document, dated 7 March 2023 shows a diagnosis of anxiety disorder, unspecified.
17. On 26 November 1980, the Army Discharge Review Board (ADRB), determined the applicant was properly and equitably discharged and denied his request for a change in the type and nature of his discharge.
18. On 16 March 2022, the ABCMR determined the overall merits of the case were insufficient as a basis for correction of the applicant's records.
19. On 18 April 2023, the applicant was informed his records have been corrected. A DD Form 215 (Correction to DD From 214) added the Korea Defense Service Medal.
20. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.
21. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.
22. MEDICAL REVIEW:
- a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his under other than honorable conditions (UOTHC) characterization of

service. He contends he experienced an undiagnosed mental health condition that mitigates his misconduct.

b. 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:

- The applicant enlisted into the Regular Army on 11 May 1977.
- The applicant accepted NJP on 13 July 1977 for being AWOL; violating a lawful general regulation by purchasing goods for illegal transfer or production of income through sale, barter, or exchange; and failing to present, upon request of military law enforcement personnel or other authorized personnel acting in an official capacity. He also had court-martial charges preferred against him for this, and after consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200, Chapter 10, in for the good of the service, lieu of trial by court-martial.
- The applicant was discharged on 12 September 1979 and completed 2 years, 4 months, and 2 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts an undiagnosed mental health condition was a mitigating factor in his discharge, and he discusses circumstances in his family at the time of his enlistment. The application includes a decision letter from the VA dated 2 December 2021, which states that his discharge is considered dishonorable for VA purposes. However, a separate decision letter dated 18 October 2021 indicates that the applicant is entitled to health care for any disabilities determined to be service connected. A Mental Disorders Disability Benefits Questionnaire (DBQ) signed on 3 July 2023 showed that the applicant endorsed symptoms of anxiety since his discharge from the service, and he was diagnosed with Anxiety Disorder, not otherwise specified. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 discharge? Yes. The applicant asserts he had an undiagnosed mental health condition

at the time of the misconduct. Documentation from a DBQ completed in 2023 showed that the applicant was diagnosed with Anxiety Disorder, not otherwise specified.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. The applicant did provide a document indicating a diagnosis of Anxiety Disorder, but there is no nexus between this condition and the misconduct for which the applicant was discharged. Additionally, the presence of misconduct is not sufficient evidence of a mitigating mental health condition during active service.

g. However, the applicant contends he was experiencing mental health condition or an experience that mitigated 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 counsel's statement, 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, available military records and the medical review the Board concurred with the advising official finding insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. The opine noted, there is a lack of evidence to support a nexus between the applicant's condition and the misconduct for which he was discharged.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and violating a lawful general regulation by purchasing goods for illegal transfer or production of income through sale, barter, or exchange. The Board carefully considered the applicant's character letters of support attesting to his character and his work ethic. The Board noted the applicant provided no post service achievements for the Board to weigh a clemency determination. However, the Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of his under other than honorable conditions (UOTH) discharge and correction to his separation

code. Therefore, the Board found reversal of the previous Board determination is without merit and denied relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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|---|---|---|----------------------|
| : | : | : | GRANT FULL RELIEF    |
| : | : | : | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| ■ | ■ | ■ | DENY APPLICATION     |

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 Docket Number AR20210011641 on 16 March 2022.

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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 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of

the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

2. AR 635-200 (Personnel Separation-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel:

a. Paragraph 3-7a(1) states an honorable discharge is a separation with honor. 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. Only the honorable characterization may be awarded a member upon completion of his or her period of enlistment or period for which called or ordered to active duty or active duty for training, or where required under specific reasons for separation, unless an entry level status separation (uncharacterized) is warranted.

b. Paragraph 3-7b(1) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. a characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

c. Chapter 10 provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

3. AR 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JFS" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of AR 635-200, Chapter 10, for the good of the service in lieu of trial by court martial.

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 Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by veterans for modification of their

discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD); traumatic brain injury; sexual assault; or sexual harassment. Boards are 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 misconduct that led to the discharge.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//