

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 October 2024

DOCKET NUMBER: AR20240001521

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to general, under honorable conditions.

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant Personal Statement

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, in effect:

a. He enlisted at 17 years old and served in good standing for two and a half years prior to being discharged. He spent three months in the hospital in Landstuhl, Germany prior to his discharge offense. At 69 years old, he has raised a family, worked continually, and never been charged with offenses of discharge nature.

b. He volunteered for the Army in the fall of 1971. When he got out of advanced individual training (AIT) he was a couple of months short of 18 so orders were cut for him to go to Europe instead of Asia. He was stationed on the border of France, in Germany at a place called Fischbach. His welcome to Germany was an Olympic disaster. At Fischbach they armed nuclear warheads, and he was an armed guard. He was able to get a position with the Post Fire Department, which kept him from having temporary duty (TDY) all the time and being responsible for a weapon. In the fall of 1972, spring 1973, the post fell under scrutiny. This caused a lot of issues for their unit, which was comprised of military police and an ordnance battalion. People started getting trapped for drug abuse and a whole lot of crimes. Most of the unit was Vietnam veterans, which added to a power struggle at the post.

c. He contracted hepatitis while training to be a firefighter. He spent three months in the hospital, then he was released back to his unit. The unit had not gotten any better during his absence. The commander was relieved, and they gathered what they deemed all the unit misfits into a couple of barracks where they figured they could keep an eye on them. It only got worse, and it became a power struggle. He got charged with assault and put on pretrial confinement, then sent to Fort Riley, KS. They expedited his discharge, as they were dumping people out of the service during that time anyway. His unit failed a congressional inspection and was dissolved.

d. He went home, got a job, and married. He raised a family, with three wonderful daughters. About two years ago he had problems with his liver, and it nearly killed him. He believes it was a result of his time in the service, and service connected. He states that he never tested positive for drugs during his time in service.

3. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 29 November 1971, for a period of three years.

b. On 30 November 1972, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for:

- on or about 24 November 1972, failing to go at the time prescribed to his appointed place of duty, to wit: morning formation.
- on or about 24 November 1972, failing to go at the time prescribed to his appointed place of duty, to wit: education center.
- on or about 15 November 1972, derelict in the performance of his duties, in that he negligently failed to prepare his room for command inspection.
- on or about 20 November 1972, derelict in the performance of his duties in that he negligently failed to prepare his room for command inspection.

c. His punishment included forfeiture of \$100.00 for one month, restriction for 25 days, and 25 days of extra duty.

d. On 28 August 1973, the applicant's immediate commander recommended he be barred from enlistment/reenlistment in the U.S. Army. The commander stated that the applicant had failed to demonstrate reliability required in today's professional Army. He had been lax in meeting security requirements and failed to show self-motivation. He showed a negative attitude toward his military responsibilities and should not be allowed to reenlist with his present level of poor performance and unacceptable attitude.

e. On 29 August 1973, the applicant accepted NJP under the provisions of Article 15, UCMJ, for on or about 13 August 1973, willfully disobeying a lawful order from his

superior noncommissioned officer (NCO) and being disrespectful in language toward his superior NCO. His punishment included forfeiture of \$70.00 for one-month, extra duty for 14 days, and 14 days restriction.

f. On 10 September 1973, the Bar to Enlistment/Reenlistment was approved. A signed copy was placed in his personnel records jacket where it would remain a permanent part of his 201 file. The remark, "Not recommended for further service" was entered in the "Remarks" section of his DA Form 20 (Enlisted Qualification Record).

g. Special Court-Martial Order Number 4, issued by Headquarters, 32nd Army Air Defense Command, on 14 January 1974, shows the applicant was found guilty of the Charge and its one specification of on or about 25 November 1973, committing an assault upon private first class (PFC) C\_A\_ by striking him on the head with an aerosol spray can.

h. The court sentenced him to be reduced to the grade of private/E-1, to be confined at hard labor for four months, and to forfeit \$200.00 per month for three months.

i. The sentence was adjudged on 21 December 1973, and the applicant was ordered to confinement in the U.S. Army Area Confinement Facility, Manheim, or elsewhere as competent authority may direct.

j. The applicant's record does not contain the complete separation packet with the applicant's election of rights, or a record of counseling listed as an enclosure in the notification of separation. However, it contains:

(1) Special Orders Number 72, issued by the U.S. Army Retraining Brigade, Fort Riley, KS on 11 April 1974 show the applicant would be discharged, effective 12 April 1974, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), paragraph 13-5a (1), by reason of unfitness. The special instructions show the applicant requested board action.

(2) The applicant was discharged 12 April 1974. His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 13-5a (1), in the rank of and private/E-1, and his service was characterized as under other than honorable conditions (Separation Code 28B and Reenlistment Code 3). He completed 2 years and 12 days of net active service during the covered period and had 122 days of time lost. He was awarded the National Defense Service Medal.

5. There is no evidence indicating she applied to the Army Discharge Review Board for an upgrade of her discharge within that board's 15-year statute of limitations.

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

7. 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 under honorable conditions (general). On his DD Form 149, the applicant asserts Posttraumatic Stress Disorder (PTSD) is related to his request. 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 29 November 1971, 2) he received an Article 15 on 30 November 1972 for failing to go at the time prescribed to his appointed place of duty on two occasions and for being derelict in the performance of his duties in that he negligently failed to prepare his room for command inspection on two occasions, 3) on 28 August 1973, the applicant's commander recommended a bar to re-enlistment noting that the applicant had failed to demonstrate reliability, had been lax in meeting security requirements, and failed to show self-motivation. It was further noted that he showed a negative attitude toward his military responsibilities. 4) on 29 August 1973, the applicant received an Article 15 for willfully disobeying a lawful order from his superior noncommissioned officer (NCO) and being disrespectful in language toward his superior NCO. 5) On 14 January 1974, the applicant was found guilty by a Special Court-Martial of committing assault upon another Soldier by striking him on the head with an aerosol spray can, 6) the applicant was discharged on 12 April 1974 under the provisions of Army Regulation (AR) 635-200, paragraph 13-5a (1).

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 VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. A review of JLV was void of any medical records. There were no in-service, VA, or civilian BH records available for review.

d. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

## e. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the available records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion, there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH mitigation.

BOARD 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 shows, following a series of misconduct (court-martial conviction, AWOL, Article 15s, Bar to Reenlistment), the applicant's chain of command initiated separation action against him. The applicant was discharged for unfitness, with an under other than honorable conditions characterization of service. The Board found no error or injustice in his separation processing. The Board further 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 there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. 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 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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - 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. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct or for the good of the service.

d. Chapter 13 established policy and provided procedures and guidelines for eliminating enlisted personnel found to be unfit or unsuitable for further military service. Paragraph 13-5a (1) (Unfitness), states, an individual is subject to separation under the provisions of this chapter for unfitness for frequent incidents of a discreditable nature with civil or military authorities.

3. 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.

4. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

5. 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.

6. Army Regulation 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 that 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.

//NOTHING FOLLOWS//