

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20240002359

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

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 is terminally ill with stage 4 lung cancer. He would like the a correction to his discharge status. He provides a letter and states he was sexually assaulted in March 1977. He could not overcome the shame and disgrace, which is why he went absent without leave (AWOL). He does not want benefits as he has little time to live. He was a good Soldier when he was in the military. He had no problems with his higher command.

3. The applicant does not provide any supporting documentation regarding his claim of sexual assault.

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

a. DD Form 4 (Enlistment/Reenlistment Agreement-Armed Forces of the United States) reflects he enlisted in the Regular Army on 20 January 1977.

b. DA Forms 4187 (Personnel Action), 13 May 1977 and 13 June 1977 show the applicant was AWOL on 13 May 1977 and dropped from the rolls on 12 June 1977.

c. DA Form 3836 (Notice of Return of US Army Member from Unauthorized Absence), 10 November 1977 shows the applicant was apprehended by civil authorities on 31 October 1977

d. A DA Form 458 (Charge Sheet) shows court-martial charges were preferred against the applicant on 10 November 1977. The charge sheet shows he was charged with one specification of being AWOL from on or about 13 May 1977 until on or about 9 November 1977.

e. DA Form 3836, 11 November 1977 shows the applicant was returned to military control on 9 November 1977.

f. The Personnel Control Facility Interview Sheet, 11 November 1977, reflects in the remarks section of this document that the applicant states he got tired of Army life, taking orders, doing kitchen patrol, physical training, working, everything in general and went home and got a job. The family has nine kids so he had a lot of financial problems. He wants out. Not much use to the Army and he knows it. He does not appear too mature but knows what he is doing.

g. On 11 November 1977, the applicant voluntarily requested a discharge under the provision of Army Regulation 635-200 (Personnel Separations-Enlisted Separations), Chapter 10, in lieu of trial by court-martial. The applicant consulted with legal counsel 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 an undesirable discharge; the procedures and rights that were available to him.

(1) 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 Department of Veteran Affairs, 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 if discharged under a UOTHC discharge and furnished an Undesirable Discharge Certificate.

(2) He elected not to submit statements in his own behalf.

h. On 16 November 1977, his immediate commander recommended approval of the applicant's voluntary request for discharge with the issuance of a UOTHC discharge. In his opinion, the applicant had no motivation for continued service and will not respond to either counseling or rehabilitation. The applicant was pending trial for an offense punishable by a bad conduct or dishonorable discharge. On 18 November 1977, the chain of command recommended approval.

i. The separation authority approved the discharge action on 22 November 1977 under the provisions of Army Regulation 635-200, Chapter 10, and ordered the applicant reduced to the lowest enlisted pay grade and furnished an UOTHC discharge.

j. His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service-in lieu of trial by court-martial on 2 December 1977. His separation program designator (SPD) was JFS and reenlistment code 3B. His service was characterized as UOTHC. He completed 4 months and 16 days of active service.

5. On 13 June 2024, ARBA requested military police reports for official use purposes (sexual assault) from the U.S. Army Criminal Investigation Division and a copy of the narrative summary, which pertains to the applicant. The response is below.

6. On 2 July 2024, in the processing of this case the U.S. Army Criminal Investigation Division, they searched their criminal file indexes, which revealed no Sexual Assault records pertaining to the applicant.

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

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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 20 January 1977.
- DA Forms 4187 (Personnel Action), 13 May 1977 and 13 June 1977 show the applicant was AWOL on 13 May 1977 and dropped from rolls on 12 June 1977.
- Court-martial charges were preferred against the applicant on 13 June 1977. His DD Form 458 (Charge Sheet) shows he was charged with one specification of being AWOL from on or about 13 May 1977 and remained absent.
- DA Form 3836 (Notice of Return of US Army Member from Unauthorized Absence), 10 November 1977 shows the applicant was apprehended by civil authorities on 31 October 1977.
- An updated DA Form 458 shows court-martial charges were preferred against the applicant on 10 November 1977. His Charge Sheet shows he was charged with one specification of being AWOL from on or about 13 May 1977 until on or about 9 November 1977.

- Personnel Control Facility Interview Sheet, dated 11 November 1977, reflects in the remarks section the applicant states he “got tired of Army life, taking orders, doing kitchen patrol, physical training, working, everything in general and went home and got a job. The family has nine kids so he had a lot of financial problems. He wants out. Not much use to the Army and he knows it. He does not appear too mature but knows what he is doing.”
- On 11 November 1977, the applicant voluntarily requested a discharge under the provision of Army Regulation 635-200 (Personnel Separations-Enlisted Separations), Chapter 10, in lieu of trial by court-martial. The applicant consulted with legal counsel 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 an undesirable discharge; the procedures and rights that were available to him.
- His DD Form 214 (Report of Separation from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service-in lieu of trial by court-martial on 2 December 1977. His separation program designator (SPD) was JFS and reenlistment code 3B. His service was characterized as UOTHC. He completed 4 months, and 16 days of net active service. He had lost time from 15 May 1977 to 9 November 1977.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant’s file. The applicant states, “I was sexually assaulted in March 1977 in Fort Knox, KY and could not overcome the shame and disgrace, that’s the reason I went AWOL. I do not want benefits as I have little time to live. I was a good Soldier when I was in, no problem with higher command.” The applicant reported he was terminally ill with stage 4 lung cancer and wanted an upgrade of his discharge status to honorable.

d. Due to the period of service no active-duty electronic medical records were available for review.

e. The VA’s Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected, likely due to the characterization of his discharge. There was no electronic medical documentation available for review. However, the record indicates the applicant is deceased as of 26 January 2024.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had an experience of MST that mitigates his misconduct.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts experiencing MST.

(2) Did the condition exist or experience occur during military service? Yes. The applicant reports experiencing MST while in military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to one specification of being AWOL from on or about 13 May 1977 until on or about 9 November 1977. He asserts the mitigating experience of MST; being sexually assaulted in March 1977 in Fort Knox, KY. As there is an association between MST and avoidant behavior, there is a nexus between the applicant's experience of MST and his misconduct of being AWOL.

h. Per Liberal Consideration, the applicant's assertion of MST is sufficient to warrant consideration by the Board.

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 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 charged with being absent without leave from 13 May 1977 to 9 November 1977, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board majority found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention; however, reviewed the medical advisor's review and despite the medical review finding sufficient evidence in the applicant's statement, the Board majority did not. The Board minority concurred with the medical advisor's review finding sufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was not in error or unjust.

REFERENCES:

1. Title 10, U.S. Code (USC), 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. Section 1556 of Title 10, USC, 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.

3. Army Regulation 635-200 (Personnel Separations-Enlisted Personnel) sets 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 of the version in effect at the time provided that a member who committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses charged, type of discharge normally given under the provisions of this chapter, the loss of Veterans Administration benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. An Undesirable

Discharge Certificate would normally be furnished an individual who was discharged for the good of the Service.

4. Army Regulation 635-5 (Personnel Separations-Separation Documents) prescribed the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It established the standardized policy for the preparation of the DD Form 214. The DD Form 214 is a synopsis of the Soldier's most recent period of continuous active service. The general instructions stated all available records would be used as a basis for preparation of the DD Form 214. The information entered thereon reflects the conditions as they existed at the time of separation. It states for Block 9e (Character of Service) characterization or description of service is determined by directives authorizing separation. Proper completion of this block is vital since it affects the Soldier's eligibility for post-service benefits. Only six standard characterizations in this block are authorized: honorable, under honorable conditions (general), under other than honorable conditions, bad conduct, dishonorable and uncharacterized.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities and reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214 (Report of Separation from Active Duty). The SPD JFS (is to be used for RA Soldiers discharged for the good of the service-in lieu of trial by court martial).

6. The SPD/RE Code Cross Reference Table provides instructions for determining the RE Code for Active Army Soldiers and Reserve Component Soldiers. This cross-reference table shows the SPD code and a corresponding RE Code. The table in effect at the time of his discharge shows the SPD code JFS has a corresponding RE Code of "3B."

7. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes:

- RE-1 Applies to persons immediately eligible for reenlistment at time of separation
- RE-2 Applies to persons not eligible for immediate reenlistment
- RE-3 Applies to persons who may be eligible with waiver-check reason for separation
- RE-4 Applies to persons who are definitely not eligible for reenlistment

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records

(BCM/NR) 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 UOTHC 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.

9. 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; 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.

10. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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//