

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 January 2025

DOCKET NUMBER: AR20240003142

APPLICANT REQUESTS:

- an upgrade of his character of service from under conditions other than honorable to honorable
- a change in the separation reason and authority

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

- DD Form 149 (Application for Correction of Military Record), 22 February 2024
- online application, 3 March 2024
- legal brief
- Exhibit A – statement of personal history
- Exhibit B – self-authored statement
- Exhibit C – induction documentation
- Exhibit D – photos
- Exhibit E – Page 3 DA Form 20 (Enlisted Qualification Record)
- Exhibit F – Special Orders Number 121, 25 June 1970
- Exhibit G – Special Orders Number 266, 23 October 1970
- Exhibit H – separation packet
- Exhibit I – eight-character references
- Exhibit J – report of absences affecting accrued leave
- Exhibit K – DD Form 149, 18 September 1974
- Exhibit L – Summary Court-Martial Orders
- Exhibit M – Special Orders Number 43, 5 March 1971
- Exhibit N – marriage certificate
- Exhibit O – family foster home license
- Exhibit P – Bachelor of Science degree
- Exhibit Q – resume
- Exhibit R – Master of Education degree
- Exhibit S – Phi Delta Kappa documentation
- Exhibit T – education awards and certificates
- Exhibit U – certificate of completion, 20 June 1989
- Exhibit V – Robert L. Wilkie Memorandum, 25 July 2018

- Exhibit W – fingerprint submission
- Exhibit X – Department of the Army Criminal Investigation Division letter, 30 January 2023
- Exhibit Y – Military Static Line Parachuting Injuries Seen by the Airborne Battalion Provider article

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:

a. When he was drafted his academic skills were limited; however, he wanted to serve his country. He encountered language and cultural difficulties while attempting to communicate with others. These problems along with his personal family and home problems led to him being depressed and he had additional emotional episodes. While serving, he states he tried his best, did not get into trouble, he respected others, and followed orders and commands.

b. He feels his under other than honorable conditions discharge is too harsh. He went absent without leave (AWOL) due to family problems, and admits he was confused and took an easy route, instead of looking for help. After his discharge, he experienced a difficult time and even tried to re-enter the military. He acknowledges his mistakes, has taken responsibility for his actions, and has worked hard to address his issues which led to his discharge.

c. He has been a productive citizen, earned a bachelor's degree in education, a master's degree in education, taught elementary and middle school, he has volunteered as a soccer and softball coach, fostered children, and adopted one former foster child. He knows his requested action of a discharge upgrade is a serious decision that is not taken lightly; however, as he faces his last few years of life, he requests the Board give full consideration to his request and the Board considers his achievements in his civilian life.

3. Counsel reiterates the applicant's self-authored statement, addressing times of harassment, hazing, and racism which impacted the applicant's ability and desire to serve, especially when he received orders that he would deploy to Vietnam. He experienced racism, he was called derogatory names, his fellow Soldiers did not respect him because of his race and nationality. He did not trust his fellow Soldiers and became reluctant and feared going to a hostile combat zone due to lack of trust.

a. The applicant experienced family problems, his girlfriend raising her child, his family members having to quit school and help to support family. He faced severe anxiety and depression, the stress and pressure from his family responsibilities led him to increased dependency on alcohol, which triggered periods of him going AWOL.

b. After his discharge from the Army, he lived a full life and made the most of every opportunity. Counsel asks the Board to accept the ideal that service to one's country comes in more forms than fighting in combat, the applicant received his general educational development (GED), bachelor's degree, master's degree, taught thousands of children, has been a loyal and faithful husband, a loving father, and is well-respected and a powerful force for good in his community.

c. Counsel reiterates the applicant's self-authored statement, his timeline of service and describes in detail the submitted exhibits. Additionally, counsel described the applicant's initial hardship he encountered after his discharge and the applicant's post-service achievements.

d. Counsel states the applicant likely met the requirements for a discharge of at least under honorable conditions (general), if not honorable. Additionally, arguing the applicant would have likely qualified for a hardship discharge. Counsel asserts the applicant should be given the benefit of the doubt and consider the development of his state of mind at the time of the alleged misconduct and discharge.

e. Counsel completes the request on the bases of the applicant's behavior while in-service and post-service, saying the applicant is an incredible man who has dedicated the majority of his life to public service, stating not every young man is meant to go to war, not every young man's strength can be found as an infantryman, the applicant's strength was found in teaching the youth of America, and counsel believes the Board should grant the applicant clemency.

4. On his DD Form 149, the applicant indicates mental health is related to his request.

5. The applicant was inducted to the Army of the United States on 5 May 1970 and held military occupational specialty 11B (Light Weapons Infantryman). The highest rank he attained was private first class/E-3.

6. The applicant accepted nonjudicial punishment under Article 15, of the Uniform Code of Military Justice (UCMJ) on 3 December 1970, for AWOL on or about 25 November 1970 and remaining AWOL until on or about 2 December 1970. His punishment imposed was forfeiture of \$40.00 per month for two months.

7. Court-martial charges were preferred against the applicant, for violation of the UCMJ. The relevant DD Form 458 (Charge Sheet) is not available for review.

8. Before a summary court-martial on 17 February 1971, at Fort Bliss, Texas, the applicant was found guilty of one specification of going AWOL from on or about 14 December 1970 and remaining AWOL until on or about 28 January 1971. He was sentenced to forfeiture of \$120.00 for one month, reduction to the grade of E-1, and confinement at hard labor for 30 days. The sentence was adjudged on 17 February 1971. It was approved and ordered to be duly executed on 8 February 1973; however, the adjudging confinement at hard labor for 30 days was suspended for three months, and the unexecuted portion of the sentence would be remitted without further action, additionally the applicant would serve in the grade of private/E-2 unless the suspension of confinement was vacated.

9. Summary Court-Martial Order Number 2, dated 19 February 1971, set aside Summary Court-Martial Order Number 34.

10. Summary Court-Martial Order Number 104, dated 3 September 1971, ordered the sentence pertaining to confinement to be duly executed.

11. Court-martial charges were preferred against the applicant, for violation of the UCMJ on 1 September 1971. The relevant DD Form 458 (Charge Sheet) shows he was charged with one specification of going AWOL from on or about 25 March 1971 and remaining AWOL until on or about 30 August 1971.

12. He consulted with legal counsel on 17 September 1971, and executed a written request for discharge for the good of the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10 (Discharge for the Good of the Service). He acknowledged his understanding of the following in his request:

a. He understood that he could request discharge for the good of the service because the charges preferred against him could result in the imposition of a punitive discharge.

b. Prior to completing this request, he was afforded the opportunity to consult with appointed counsel, who fully advised him of the basis for his contemplated trial by court-martial, the maximum punishment authorized under the UCMJ, of the possible effects of a under other than honorable conditions character of service, and of the procedures and rights available to him.

c. He acknowledged that he was making this request of his own free will and had not been subjected to any coercion by any person. Although counsel furnished him legal advice, this decision was his own. He acknowledged that he may be deprived of many rights and benefits as a Veteran under both Federal and State law. Additionally, he elected to submit a statement in his own behalf.

(1) In his submitted statement to his command, he requested a discharge for the good of the service, he summarizes his being unable to speak English, having to quit school and help support his family, and his induction to the Army. While serving he mentions his drinking a lot, going AWOL, and suicidal ideations. He described incidents of being called numerous racial slurs, encountered fights, losing everything when he was drafted.

(2) He wrote if he did not receive a discharge, once he was released from the stockade, he would go AWOL again. He did not want the Army to waste their time nor their money on him going AWOL. He wanted to get discharged to help support his family and felt it would be better on himself and the Army for him to be discharged.

13. On 17 September 1971, the applicant's immediate commander recommended approval of his request for separation and further recommended issuance of an undesirable discharge. Additionally adding, the applicant was awaiting special court-martial for going AWOL for 159 days.

14. On 22 September 1971, his intermediate commander recommended approval of his request for separation with further recommended issuance of an undesirable discharge.

15. The separation authority approved the applicant's request for discharge for the good of the service. He further directed the applicant be furnished an Undesirable Discharge Certificate and reduced to the lowest enlisted grade of E-1.

16. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged on 4 October 1971, under the provisions of AR 635-200, for the good of the service, in the grade of E-1. His characterization of service was under conditions other than honorable. He was credited with 8 months and 24 days of net active service this period with 246 days' time lost. He did not complete his first full term of service.

17. The applicant and his counsel additionally provide:

a. Exhibits A, C, E, F, G, H, J, K, L, M – military documentation which includes but is not limited to enlistment documentation highlighting his birthplace of Mexico, induction documentation, various orders to include awards and court-martial, his separation packet, period of absences documentation, summarized in the Record of Proceedings above.

b. Exhibit B – his self-authored statement describing his enlistment and discharge, from the racism he endured, family hardships, to his discharge, and his post-service achievements accomplished, summarized in the Record of Proceedings above.

c. Exhibits D, N, O, P, Q, R, S, T, U – personal photos, marriage certificate, family foster home license, Bachelor of Science degree, Master of Education degree, resume, Phi Delta Kappa initiation, numerous awards, numerous certificates from achievement to completion, transcripts, and credential certificates.

d. Exhibit I – 8-character reference statements ranging from the applicants brother, wife, coworkers, and superiors in the education field, and an Army battle buddy, of whom describe the applicant as determined, a well-respected individual, a dedicated teacher and family man, trusting, patient, kind, approachable, compassionate towards students and family, a role model, reliable and hardworking, and a person with strong work ethic and always willing to help those who are in need.

e. Exhibit V, W, X, Y – Wilkie memorandum, fingerprint check, Criminal Investigation Division documentation, and Military Static Line Parachuting Injuries seen by the Airborne Battalion Provider article.

18. Administrative separations under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service. A characterization of service of under conditions other than honorable is normally considered appropriate.

19. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

20. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to honorable and a change in the separation reason and authority. 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 was inducted into the Regular Army on 5 May 1970.
- The applicant accepted NJP on 3 December 1970 for being AWOL from 25 November 1970 until 2 December 1970.
- Before a summary court-martial on 17 February 1971 the applicant was found guilty of one specification of going AWOL from 14 December 1970 until 28 January 1971.
- Court-martial charges were preferred against the applicant for one specification of going AWOL from 25 March 1971 until 30 August 1971, and the applicant

requested discharge for the good of the service, which was approved by his commander and the separation authority.

- The applicant was discharged on 4 October 1971 and was credited with 8 months and 24 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts stress related to being drafted into the military as a non-English speaking immigrant who experienced harassment and racism by fellow soldiers as a mitigating condition to his misconduct, and he indicated "other mental health" as a factor. Documentation from his time in service showed a personal statement by the applicant that explained the distress he was experiencing related to being a Hispanic in the military, financial challenges to his family as a result of his service, use of alcohol and drugs to cope with the stress, and thoughts of ending his life. There were no medical or mental health records included in the application. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, 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, beyond self-report, 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. There were no medical or mental health records from his time in service or after discharge showing any mental health related symptoms or diagnoses. However, the applicant's personal statement from his time in service discusses nervousness, social isolation, suicidal ideation, and substance use.

(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. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. At the time, the applicant did report experiencing harassment, extreme fear, and significant family stressors, and he expressed thoughts of suicide as well as inadequate coping through substance use.

Had he been evaluated by a mental health provider at the time, it is possible he could have been diagnosed with a mental health condition. Avoidant behavior, such as going AWOL, can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Yet, the presence of misconduct alone is not sufficient evidence of a mitigating mental health condition during active service. However, the applicant contends he was experiencing a mental health condition 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 partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the short term of honorable service completed prior to the multiple AWOL offenses leading to the applicant's separation, the Board found an Honorable Discharge and/or a change to the applicant's separation authority/reason was inappropriate. However, based upon the demonstrated growth since the misconduct, the Board concluded clemency was warranted by upgrading the applicant's characterization of service to reflect Under Honorable Conditions (General).

BOARD VOTE:

| <u>Mbr 1</u> | <u>Mbr 2</u> | <u>Mbr 3</u> | |
|--------------|--------------|--------------|----------------------|
| : | : | : | GRANT FULL RELIEF |
| :XXX | :XXX | :XXX | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| : | : | : | DENY APPLICATION |

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214 showing:

- Characterization of Service: Under Honorable Conditions (General)
- Separation Authority: No change
- Separation Code: No change
- Reentry Code: No change
- Narrative Reason for Separation: No change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge to Honorable and/or changing the narrative reason for separation.

//SIGNED//

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, 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 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 ABCMR applicants (and/or their counsel) prior to adjudication.

3. 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. Paragraph 5–3 (Secretarial plenary authority) provides that:

(1) Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

(2) Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers. When used in the latter circumstance, it is announced by special Headquarter, Department of the Army directive that may, if appropriate, delegate blanket separation authority to field commanders for the class category of Soldiers concerned.

b. Chapter 10 of that regulation 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 conditions other than honorable is normally considered appropriate.

c. 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.

d. 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.

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 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; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

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//