

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 September 2024

DOCKET NUMBER: AR20240003902

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

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

- DD Forms 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Department of Veterans Affairs (VA) (Medical Records)

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 his discharge was unjust and prejudiced. He is citing an undiagnosed mental health condition that influenced his actions. He feels he was unfairly demoted from E4 to E1 and claims his behavior was not within his control, due to his untreated illness. His dream was to retire from the United States Army.
3. The applicant provides
  - a. Two DD Form 149 and a DD Form 293.
  - b. A VA release of information letter with the applicant's medical records dated 11 October 2024(pages 7 - 42).
4. A review of the applicant's service record shows:
  - a. He enlisted in the Regular Army on 28 June 1976.

b. On 8 December 1977, he accepted nonjudicial punishment for disrespectful language to a superior noncommissioned officer. His punishment included reduction to private first class (PFC)/E-3 (suspended for a period of 60 days) and forfeiture of \$50.00 for a period of one month.

c. On 4 December 1978, court-martial charges were preferred on the applicant for:

- Specification 1 – on or about 17 November 1978, wrongfully possession of habit-forming narcotic drug.
- Specification 2 – on or about 17 November 1978, wrongfully sell a habit-forming narcotic drug.
- Specification 3 – on or about 17 November 1978, wrongfully transfer a habit-forming narcotic drug.

d. On 11 March 1998, after consulting with legal counsel he requested a discharge for the good of the service under the provisions of chapter 10, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel). He acknowledged:

- maximum punishment
- he was guilty of the charges against him or of a lesser included offense
- he does not desire further rehabilitation or further military service
- if his request for discharge was accepted, he may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Conditions Discharge Certificate
- he would be deprived of many or all Army benefits, he may be ineligible for many, or all benefits administered by the Veterans Administration
- he may be deprived of his rights and benefits as a veteran under both Federal and State law
- he may expect to encounter substantial prejudice in civilian life

e. In the service record shows, the chain of command recommendations approval of the applicant's request for discharge for the Good of the Service and he would be issued an Under Other Than Honorable Conditions Discharge Certificate.

f. On 9 January 1979, a Standard Form (SF) 88 (Report of Medical Examination) shows, the applicant was evaluated for the purpose of separation under AR 635-200 (Personnel Separations – Enlisted Personnel) chapter 10. The record is void of the full medical report for the board to review.

g. On 30 January 1979, the Staff Judge Advocate recommended the approval of the request for discharge for the good of the service and that an Under Other Than Honorable Discharge Certificate be issued.

h. The record is void of the chain of command recommendation(s).

i. On 30 January 1979, the separation approval authority approved the applicant's request for discharge the Good of the Service. He would be issued an Under Other Than Honorable Conditions Discharge Certificate and reduced to the lowest enlisted pay grade.

j. On 6 February 1979, he accepted nonjudicial punishment for count 1 disrespect toward a superior commissioned officer. Count 2 failure to follow a lawful order from a superior commissioned officer. Count 3 striking a superior commissioned officer. His punishment included forfeiture of \$203.00 for a period of two months.

k. On 8 February 1979, orders number 39-28 shows the applicant was reduced to private (E-1) effective 30 January 1979 and he will be scheduled for discharge 13 February 1979.

l. On 12 February 1979, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 2 years, 7 months, and 15 days of active service with no lost time. He was assigned separation code JFS and the narrative reason for separation listed as "AR 635-200 chapter 10," with reentry code 3. It also shows he was awarded or authorized:

- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M16)
- Expert Marksmanship Qualification Badge with Hand Grenade

5. There is no evidence the applicant has applied to the Army Discharge Review Board for review of her discharge within that board's 15-year statute of limitations.

6. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or dishonorable discharge, may submit a request for discharge for the good of the service. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged for the good of the service.

7. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

#### 8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his Under Other than Honorable Conditions (UOTHC) discharge. On his application the applicant indicated 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 28 June 1976, 2) he accepted nonjudicial punishment on 08 December 1977 for disrespectful language to a superior noncommissioned officer (NCO), 3) on 04 December 1978 court-martial charges were preferred on the applicant for wrongful possession of a habit-forming narcotic drug, wrongfully selling a habit-forming narcotic drug, and wrongful transfer of a habit-forming narcotic drug, 4) on 06 February 1979, he received NJP for disrespect towards a superior commissioned officer, failure to follow a lawful order from a superior commissioned officer, and striking a superior commissioned officer, 5) he was discharged on 12 February 1979 under the provisions of AR 635-200, Chapter 10, with a separation code of JFS and reentry code of '3.'

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. An in-service Report of Medical Examination dated 09 January 1979 for the purposes of Chapter 10 separation shows item number 42, psychiatric, as 'normal' on clinical evaluation.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions. He initiated BH services through the VA on 16 August 2019 with the diagnosis noted as Major Depressive Disorder, Recurrent, Moderate. There was a gap in BH documentation until 22 July 2022 wherein he was seen by BH due to panic attacks. It was documented that he had seen a community psychiatrist approximately two weeks prior to the appointment and was prescribed Abilify and Xanax. Records show he was evaluated for suicidal ideation in October 2022 and in December 2022 was diagnosed with Alcohol Use Disorder (AUD), Moderate and Cannabis Use Disorder, Mild. The applicant was seen on 11 October 2024 via nursing mental health triage noting he was requesting documentation regarding a PTSD diagnosis. The nurse documented that the applicant had been unable to be assessed for PTSD due to his eligibility for care status. At the time of the visit, the nurse documented that he screened positive for PTSD. Review of the screening results shows he also screened positive for depression (PHQ9=20 (severe depression)) and anxiety (GAD7=15 (clinically significant)).

e. The applicant provided medical records from a civilian physician (MD) dated 05 July 2022 through 08 November 2023 as part of his application [*Advisor's Note*: the

provider's specialty is not specified though presumed to be psychiatry based on review of the notes and VA documentation]. Review of the records shows he reported a history of anxiety and depressive symptoms. Throughout the course of treatment, he was diagnosed with Panic Disorder and was trialed on several medications to address his anxiety/panic symptoms to include Sertraline (antidepressant), Xanax (anxiolytic), Clonazepam (anxiolytic), and Gabapentin (anxiety). He was also trialed on Donepezil for cognitive enhancement. It was also documented that the applicant reported a history of substance use and as well as a previous diagnosis of Bipolar Disorder when he was applying for SSI benefits [*Advisor's Note:* the records documenting a previous diagnosis of Bipolar Disorder were not available for review to this Advisor]. There was no documentation specifying the onset of his diagnosis of Panic Disorder.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient information 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.

g. 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 records was void of any BH diagnosis or treatment history for the applicant in-service. Although post-discharge VA documentation shows he has been diagnosed with Major Depressive Disorder, Recurrent, Moderate, and diagnosed with Panic Disorder through a non-VA/civilian provider, he is not service-connected through the VA for any BH conditions, and the records do not specify the date(s) of onset for either condition or associate his condition(s) with his service. Additionally, his VA records show he was diagnosed with AUD and Cannabis Use Disorder, to which it is noted that alcohol and substance use disorders do not constitute mitigating conditions. In absence of documentation supporting his assertion, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH mitigation. However, he contends that his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant 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. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the misconduct leading to the applicant's separation and the findings of the medical review that there was a lack of mitigation for such misconduct, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant'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.

12/27/2024

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

a. Paragraph 3-7a (Honorable Discharge) 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.

b. Paragraph 3-7b (General Discharge) 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.

c. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or dishonorable discharge, may submit a request for discharge for the good of the service. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged for the good of the service.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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 under other than honorable conditions 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.

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 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, on 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. 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.

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 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.

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//