

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 December 2024

DOCKET NUMBER: AR20240004077

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general) or honorable.

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

DD Form 149 (Application for Correction of Military Record)

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 he is having issues because of the trauma he experienced during his time in service. His current status is causing red flags when he applies for housing. He was injured by another recruit while at basic training; he suffered broken facial bones. He was harassed constantly. Being only 17 years old, he did not know how to be a Soldier while under so much prejudice. He could not adjust to Army life.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) and harassment issues are related to his request.
4. On 26 January 1973, the applicant enlisted in the Regular Army for 4 years. The highest grade he attained was E-2.
5. A clinical record dated 12 September 1973, shows the applicant was admitted for treatment of a fracture of the right zygoma, on 25 July 1973. He was in an altercation in the barracks. He was evaluated as an outpatient and admitted awaiting decrease in edema prior to surgical reduction.
6. On 3 January 1974, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military control on 16 January 1974.

7. On 17 January 1974, the applicant was reported as AWOL a second time, and remained absent until he returned to military control on 20 January 1974.

8. Before a special court-martial on 1 March 1974, at Fort Carson, CO, the applicant was found guilty of two specifications of going AWOL; two specifications of behaving himself with disrespect towards two superior commissioned officers, on or about 21 January 1974; one specification of assaulting a superior commissioned officer, on or about 21 January 1974; and two specifications of wrongfully communicating a threat to two superior commissioned officers, on or about 21 January 1974.

9. The court sentenced him to a Bad Conduct Discharge (BCD), confinement at hard labor for four months, forfeiture of \$215.00 pay per month for four months, and reduction to E-1. The sentence was approved on 4 June 1974, and the record of trial was forwarded for appellate review.

10. A DD Form 1478 (Prisoner's Summary Continuation Sheet) dated 12 March 1974, shows a social work officer noted that the applicant stated his finance records were incorrect and he was not receiving payment. The applicant received a lot of harassment and lost control of himself because of the combined pressures. The social work officer summarized that the applicant was an immature individual who had problems accepting responsibility and authority figures. He had several encounters with civil and military authorities and may have further difficulties in the future.

11. On 15 August 1974, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for disobeying a lawful order from his superior noncommissioned officer, on or about 7 August 1974. His punishment included 14 days extra duty.

12. On 20 September 1974, the applicant accepted NJP under Article 15 of the UCMJ, for being disrespectful in language to a superior noncommissioned officer, on or about 19 September 1974. His punishment included reduction to E-1, seven days forfeiture of pay (\$76.00), and 14 days extra duty.

13. On 4 December 1974, the applicant accepted NJP under Article 15 of the UCMJ, for assaulting a Soldier by striking him with his fist, on or about 27 October 1974. His punishment included forfeiture of \$172.00 for one month.

14. A Criminal Investigation Division (CID) report of investigation (ROI), established probable cause to believe the applicant attempted to induce and entice a female informant into acts of prostitution, on 22 January 1975. The applicant was arrested and placed in pre-trial confinement.

15. Before a special court-martial on 24 March 1975, at Fort Knox, KY, the applicant was found guilty of one specification of disobeying a lawful command from his superior commissioned officer, on or about 16 January 1975; and one specification of wrongfully and unlawfully enticing a Soldier to engage in acts of prostitution, on or about 22 January 1975.

16. The court sentenced him to forfeiture of \$229.00 pay per month for six months, and confinement at hard labor for six months. The sentence was approved on 29 May 1975, and the record of trial was forwarded for appellate review.

17. Special Court-Martial Order 427, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, on 15 August 1975, noted the applicant served his period of confinement and he was restored to duty pending completion of appellate review.

18. Special Court-Martial Order 489, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, on 17 October 1975, noted the applicant's sentence as promulgated in Special Court-Martial Order 89, had been affirmed and ordered the sentence to be duly executed.

19. The applicant was discharged on 12 December 1975. His DD Form 214 (Report of Separation from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-2, by reason of court-martial. His service was characterized as UOTHC. He was assigned Separation Code JJD and Reenlistment Code RE-4. He was credited with 1 year, 8 months, and 14 days of net active service this period with 369 days of time lost.

20. On 30 September 2024, the ABCMR staff requested that the applicant provide medical documents to support his mental health issues. He was advised that he could contact the doctor that diagnosed him or his Veterans Affairs regional office for assistance. He did not respond.

21. On 2 December 2024, the applicant was provided a copy of the CID ROI and afforded 15 days to provide comments. As of 17 December 2024, the applicant has not responded.

22. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

23. 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.

24. 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 something more favorable. He contends he experienced an undiagnosed mental health condition, including PTSD, and sexual assault/harassment (MST) 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 26 January 1973.
- Before a special court-martial on 1 March 1974 the applicant was found guilty of two specifications of going AWOL; two specifications of behaving himself with disrespect towards two superior commissioned officers; one specification of assaulting a superior commissioned officer; and two specifications of wrongfully communicating a threat to two superior commissioned officers.
- On 15 August 1974, the applicant accepted NJP under for disobeying a lawful order from his superior NCO, and on 20 September 1974 he accepted NJP for being disrespectful in language to a superior NCO.
- On 4 December 1974 the applicant accepted NJP for assaulting a Soldier by striking him with his fist.
- A CID report of investigation established probable cause to believe the applicant attempted to induce and entice a female informant into acts of prostitution on 22 January 1975.
- Before a special court-martial on 24 March 1975 the applicant was found guilty of one specification of disobeying a lawful command from his superior commissioned officer and one specification of wrongfully and unlawfully enticing a Soldier to engage in acts of prostitution.
- The applicant was discharged on 12 December 1975 and was credited with 1 year, 8 months, and 14 days of net active service.

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 asserts he was injured by a recruit in basic training and faced harassment and prejudice. He indicated PTSD and sexual harassment/assault (MST) as mitigating factors in his misconduct. A Prisoner's Summary Continuation Sheet dated 12 March 1974 and signed by a Social Work Officer indicated that the applicant reported he had not been receiving payment, and he had received a lot of harassment, which caused

him to lose control of himself due to the combined pressures. The summary concluded that the applicant was immature and had difficulty accepting responsibility and a problem with authority figures, and it indicated he may have difficulty adjusting to confinement. A Report of Medical Examination dated 14 August 1975 showed no indication of any psychiatric symptoms. There was insufficient evidence that the applicant was diagnosed with PTSD or another 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 record of the applicant.

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, including PTSD, at the time of the misconduct. Documentation by a social worker during his time in service does not offer any evidence of the presence of any mental health symptoms or conditions, and JLV has no record of the applicant.

(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, and the application did not include any mental health records. The applicant asserts a fully mitigating behavioral health experience, MST, but his narrative points primarily to harassment associated with racial prejudice. Misconduct related to being AWOL, disrespect toward authority, disobeying a lawful order, or using disrespectful language could be the natural sequelae to mental health conditions associated with exposure to traumatic or stressful events, but there is no nexus between PTSD/MST and his misconduct related to assault or enticing a soldier to engage in acts of prostitution. These types of misconduct are not part of the natural history or sequelae of a mental health condition, and PTSD/MST does not affect one's ability to distinguish right from wrong and act in accordance with the right.

g. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. However, the applicant contends he had a 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/was not warranted. The Board carefully considered 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 request and available military records and medical review, the Board concurred with the advising official finding insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of assaulting a Soldier by striking him with your fist and attempting to induce and entice a female informant into acts of prostitution. The Board noted, the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Furthermore, the Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 8 months, and 14 days of net active service. The Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTH) discharge to a general under honorable conditions discharge or honorable. Therefore, the Board denied relief.

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.

[REDACTED]

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. Title 10, U.S. Code, Section 1556, 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 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. The version in effect at the time provided that:
  - 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. Chapter 11, paragraph 11-2, provided that a member would be given a BCD pursuant only to an approved sentence of a general court-martial or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised 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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, 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 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.

7. 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//