

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 December 2024

DOCKET NUMBER: AR20240005382

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

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

DD Form 149 (Application for Correction of Military Record), 15 February 2024.

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 indicates on his application that other mental health issues or conditions are related to his request. He states he was immature and had a drinking problem at the time of his service.
3. A review of the applicant's service records shows:
 - a. On 30 May 1978, he enlisted in the Regular Army for a period of 4 years. He completed Basic Combat Training and Advanced Individual Training, and he was awarded military occupational specialty 36C (Wire Systems Installer).
 - b. On 30 November 1978, he was promoted to private 2/E-2.
 - c. He accepted nonjudicial punishment (NJP) under provisions of Article 15 of the Uniform Code of Military Justice (UCMJ):
 - (1) On 25 January 1979 for absencing himself from his place of duty at Company B, 32d Signal Battalion, Frankfurt-Hoechst, Germany, from on or about 0730 hours on 9 January 1979 until on or about 0730 hours on 10 January 1979. His punishment consisted of \$50.00 for 1 month and 14 days of extra duty. He did not appeal this punishment.

(2) On 8 June 1979 for absenting himself from his place of duty at 1st Unit, 1st Battalion, U.S. Army Retraining Brigade, Fort Riley from on or about 2240 hours, 2 August 1979 to on or about 2240 hours, 2 August 1979. His punishment consisted of forfeiture of \$75.00 for 1 month, 14 days of extra duty, and 14 days of restriction. He did not appeal this punishment.

d. Special Court-Martial Order Number 3, issued by Headquarters (HQ), 32nd Signal Battalion (Corps), dated 14 June 1979, reflects he was arraigned, tried, found guilty; sentenced to reduction to private 1/E-1, confinement at hard labor for 45 days, to forfeiture of \$50.00 pay per month for 6 months; of the charges and specifications:

(1) Charge 1, Specification 1 of Article 121 of the UCMJ: wrongful appropriation of a 1/4-ton jeep on 1 March 1979, of a value of about \$8,173.00, the property of the U.S. Army; and

(2) Charge 1, Specification 2 of Article 121 of the UCMJ: wrongful appropriation of a 1/4-ton jeep on 7 March 1979, of a value of about \$8,173.00, the property of the U.S. Army;

(3) The sentence was adjudged on 4 June 1979, and the sentence was approved on 14 June 1979.

e. On 6 July 1979, he was released from confinement and returned to duty.

f. On 12 July 1979, he was reassigned to 1st Unit, 1st Battalion, U.S. Army Retraining Brigade (USARB), Fort Riley for rehabilitative training.

g. He accepted NJP under provisions of Article 15 of the UCMJ:

(1) On 24 July 1979 for willfully disobeying the lawful order of a captain to be prepared for barracks inspection at 1st Unit, 1st Battalion, USARB, Fort Riley, at 1300 hours on 17 July 1979. His punishment consisted of \$75.00 for 1 month, 7 days of extra duty, and 7 days of restriction. He did not appeal this punishment.

(2) On 9 August 1979 for disrespectful behavior towards a major by the tone of his voice, deportment, and surly manner, to said major at 1st Unit, 1st Battalion, USARB, Fort Riley, on 6 August 1979. His punishment consisted of forfeiture of \$25.00 for 1 month, 14 days of extra duty, and 14 days of restriction. He did not appeal this punishment.

h. On 13 August 1979, the commander of the USARB program interviewed him. He noted his acts of misconduct and failure to make satisfactory progress in the training program were due to his desire to be discharged from the Army.

i. On the same date, the Company Commander, USARB, recommended he be eliminated from service before the expiration of his term of service for misconduct because of frequent incidents of a discreditable nature, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-33. In this recommendation his company commander noted the applicant had received one court-martial and four instances of NJP; he was sent to the USARB; however, his actions since arriving precluded accomplishment of retraining. He had demonstrated little desire for returning to duty; and he received counseling by members of the leadership team and members of the professional staff agencies. In his commander's opinion his record and failure to react constructively to the rehabilitation program indicated he should not be retained in the service.

j. On 14 August 1979, he was given the opportunity to consult with a member of the Judge Advocate General's Corps and made fully aware of the right to a physical examination and the effects of waving a physical examination prior to his discharge. He requested waiver of his physical examination. He understood he may be waving his medical benefits.

k. On 14 August 1979, the Company Commander, USARB, notified him of his intent to initiate his discharge from the Army under the provisions of Army Regulation 635-200 paragraph 14-33, for a pattern of misconduct, and notified him of his rights. He understood he had the right to have his case considered by a board of officers; to submit statements in his own behalf; to be represented by counsel; to waive any of these rights and to withdraw any waiver of rights at any time prior to the date the discharge authority directs or approved his discharge; and request your case be presented before a board of officers. In electing his rights, he waived consideration of his case by a board of officers, he waived a personal appearance before a board of officers, he waived representation by counsel; and he elected not to submit statements in his own behalf.

l. On an unspecified date his intermediate commander recommended approval of his company commander's recommendation.

m. On 16 August 1979, the separation authority approved his discharge with an under other than honorable conditions characterization of service and he waived further rehabilitative efforts.

n. On 17 August 1979, the applicant was discharged under the provisions of Army Regulation 635-200, paragraph 14-33b (1). His DD Form 214 (Report of Separation for

Active Duty) shows he completed 1 year, 1 month, and 10 days of net active service and his character of service was under other than honorable conditions.

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

5. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge. He contends he experienced mental health conditions that mitigate his misconduct. 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 on 30 May 1978; 2) The applicant accepted nonjudicial punishments (NJPs) on 25 January 1979 and 08 June 1979 for absenting himself from his place of duty; 3) Special Court-Martial Order, dated 14 June 1979, reflects the applicant was arraigned, tried, found guilty of wrongful appropriation of a jeep on 01 March 1979 and on 07 March 1979; 4) The applicant again accepted NJPs on 24 July and 09 August 1979 for disobeying an order and being disrespectful toward a commissioned officer; 5) On 17 August 1979, the applicant was discharged, paragraph 14-33b(1), with Separation code JKA. His service was characterized as under other than honorable conditions.

b. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient medical evidence the applicant reported or was diagnosed with a mental health disorder, while on active service.

d. A review of JLV provided insufficient evidence the applicant has ever been diagnosed with a mental health condition, and he does not receive any service-connected disability. No additional medical documentation was provided for review.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced mental health conditions which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions that mitigates his misconduct while on active service.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did repeatedly engage in misconduct to include wrongfully appropriation of military property. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record, and published Department of Defense guidance for liberal consideration of discharge upgrade requests, the Board found that relief was not warranted.

2. The Board carefully considered the applicant's contentions, evidence in the military record, the frequency and nature of his misconduct, the multiple attempts at rehabilitation, the NJP and court-martial outcomes and the reason for his separation. The Board considered the applicant's claim of a behavioral health condition and the review and conclusions of the medical review. The Board found: (1) the applicant asserts that he experienced mental health conditions which mitigates his misconduct; (2) the applicant asserts he experienced mental health conditions that mitigates his misconduct while on active service; (3) there was insufficient evidence beyond his self-report to confirm the presence of a mental health condition that would mitigate the misconduct and warrant an upgrade as a matter of liberal consideration. Based on a preponderance of evidence, the Board determined that the applicant's discharge and characterization 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.

X [Redacted Signature]

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 provided the authority and general provisions governing the separation of enlisted personnel prior to the end of their ETS to meet the needs of the service and its members. It provided the criteria governing issuance of honorable, general, and under other than honorable discharge certificates.

a. Paragraph 1-13(a) provided an honorable discharge is a separation with honor. Issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.

b. Paragraph 1-13(b) provided a general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. The recipient of a general discharge is normally a member whose military record and performance is satisfactory. The member may have had frequent nonjudicial punishments but not for serious infractions. He may be a troublemaker, but his conduct is not so bad as to require discharge for cause or a discharge under less than honorable conditions.

c. Paragraph 1-13(c) provided a discharge under other than honorable condition is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, for security reasons, or for the good of the service.

d. Paragraph 14 Separation for Misconduct. This chapter establishes policy and prescribes procedures for the elimination of enlisted personnel for misconduct by reason of fraudulent enlistment/reenlistment, conviction by civil court (members who have been initially convicted or adjudged juvenile offenders), desertion and absence without leave, and other acts or patterns of misconduct.

e. Paragraph 14-33b (1). Other Misconduct. Members are subject to separation under the provisions of this section for patterns of misconduct.

f. Paragraph 14-33(b)(1). Patterns of Misconduct. Members are subject to separation under the provisions of this section for patterns of misconduct: frequent incidents of discreditable nature with civil or military authorities.

3. Army Regulation 635-5-1 (Separation Program Designators), then in effect (12 April 1978), provided the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation code to be entered on the DD Form 214. It identified the separation code "JKA" as the appropriate code to assign to enlisted personnel administratively discharged under the provisions of Army Regulation 635-200, paragraph 14-33b (1), based on Misconduct - Frequent incidents of a discreditable nature with civil or military authorities.

4. 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 PTSD (Post-Traumatic Stress Disorder) 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.

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. 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. 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.

6. Section 1556 of Title 10, U.S. 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.

//NOTHING FOLLOWS//