

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 December 2024

DOCKET NUMBER: AR20240005464

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 293 (Application for the Review of Discharge)
- DD Form 214 (Report of Separation from Active Duty)

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 needs a general discharge in order to apply for Veterans Affairs' benefits.
3. On his DD Form 293, the applicant notes other mental health issues are related to his request.
4. On 11 August 1976, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 12B (Combat Engineer). The highest grade he attained was E-2.
5. On 8 April 1977, the applicant was reported as absent without leave (AWOL) and remained absent until his apprehension by civil authorities. He was returned to military authorities on 10 July 1977.
6. On 19 July 1977, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

7. On 19 July 1977, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for going AWOL. His punishment included reduction to E-1, forfeiture of \$87.00 for one month, and 14 days restriction and extra duty.

8. On 3 January 1978, the applicant was reported as AWOL a second time and remained absent until his apprehension by civil authorities. He was returned to military authorities on 27 June 1978.

9. Before a special court-martial on 17 August 1978, at Fort Ord, CA, the applicant was found guilty of one specification of going AWOL.

10. The court sentenced the applicant to reduction to E-1, forfeiture of \$100.00 per month for three months, and confinement at hard labor for 45 days. The sentence was approved on 31 August 1978.

11. On 22 September 1978, the applicant accepted NJP under Article 15 of the UCMJ, for altering a sick call slip with the intent to deceive, on or about 18 September 1978; and disobeying a lawful order from his superior noncommissioned officer, on or about 20 September 1978. His punishment included forfeiture of \$92.00 for one month, and 14 days restriction and extra duty.

12. The applicant's commander notified him on 6 October 1978, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel) for shirking.

13. The applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions were issued to him. He acknowledged he understood that, as the result of issuance of a discharge UOTHC, he may be ineligible for many or all benefits as a Veteran under both Federal and State laws. He declined to submit a statement in his own behalf.

14. The applicant requested a medical waiver on his physical examination. He acknowledged he understood that he may be waiving his medical benefits.

15. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-33b, for misconduct because of an established pattern of shirking. As the specific reasons, his commander noted that a discharge for unsuitability was not deemed appropriate because the applicant's behavior was not due to an inability to satisfactorily perform within the meaning of unsuitability. He cited the applicant's special court-martial and two Article 15s.

16. Consistent with the chain of command recommendations, the separation authority approved the recommended discharge on 26 October 1978, and directed the issuance of an UOTHC discharge certificate.

17. The applicant was discharged on 30 October 1978. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 14-33b(2). He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 1 year and 5 months of net active service this period with 290 days of lost time.

18. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 10 March 1981, the Board voted to deny relief and determined his discharge was both proper and equitable.

19. 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.

20. 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.

21. 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. He contends he experienced an undiagnosed mental health condition, including PTSD, 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 11 August 1976.
- The applicant was AWOL from 8 April 1977 until 10 July 1977 and accepted NJP on 19 July 1977, and he was AWOL again from 3 January 1978 until 27 June 1978 and was found guilty by a special court-martial.
- On 22 September 1978, the applicant accepted NJP for altering a sick call slip with the intent to deceive and disobeying a lawful order from his superior NCO.
- Separation action for shirking was initiated against him on 6 October 1978. As the specific reasons, his commander noted that a discharge for unsuitability was not deemed appropriate because the applicant's behavior was not due to an

inability to satisfactorily perform within the means of unsuitability. He cited the applicant's special court-martial and two Article 15s.

- The applicant was discharged on 30 October 1978 and completed 1 year and 5 months 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 a need for a discharge upgrade in order to apply for VA benefits, and he indicated mental health as a mitigating factor in his discharge. A Report of Mental Status Evaluation dated 19 July 1977 showed that the applicant was considered mentally responsible, could distinguish right from wrong, met retention standards, and had the capacity to understand and participate in the board proceedings. A Report of Medical Examination dated 7 July 1977 indicated the applicant did not report any psychiatric symptoms and was considered qualified for service. A Social Work In-Processing Form dated 29 August 1978 provided a brief psychosocial history, including documentation of no history of medical or psychiatric problems, and noted that the applicant reported he went AWOL to help his disabled father on his farm, and he expressed intention to request a hardship discharge. The evaluator recommended continued training and stated, "[REDACTED] is not cleared at this time." A Training Progress Note dated 3 October 1978 authored by a social worker noted that the applicant was not progressing in training, had expressed a desire to get out of the Army, and recommended administrative action deemed appropriate by command. A memorandum dated 6 October 1978 with the subject line "discharge of personnel for misconduct-shirking" discussed a pattern of behavior indicative of disregard for military authority and that the individual possessed the mental and physical ability to be effective but did not desire retention. 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 one encounter with VA on 4 April 2024 indicating need for housing assistance.

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 at the time of the misconduct.

(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. However, there is documentation that the applicant met with a social worker and discussed his father's disability and his need for assistance on their farm as his rational for being AWOL. Documentation showed that the applicant was considered suitable for continued military service and that he was informed on the process for filing for a hardship discharge. It is unclear as to whether or not he pursued this. Being AWOL and having disregard for military authority can be a natural sequela to mental health conditions associated with exposure to trauma or stressful events. Yet, the presence of misconduct is not sufficient evidence of a mitigating mental health condition during active service.

g. However, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation 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.

12/16/2024

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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 Separation – 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 14, paragraph 14-33b(2) provides for the separation of Soldiers when they have patterns of misconduct – an established pattern for shirking.

4. 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 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.

5. 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.

6. 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//