

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 April 2025

DOCKET NUMBER: AR20240006963

APPLICANT REQUESTS: reconsideration of the previous Army Board for Correction of Military Records (ABCMR) decision promulgated in Dockets Number AR20090008456 on 6 August 2009 and AR20190001958 on 24 May 2019. Specifically, he requests his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)
- Partial Problem List (Page 2 of 13)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Dockets Number AR20090008456 on 6 August 2009 and AR20190001958 on 24 May 2019.
2. The applicant enlisted in the Regular Army on 27 September 1974.
3. The applicant appeared before the District Court on 26 May 1976, where he was convicted of the delivery and sale of a controlled substance (heroin). He was sentenced to 15 years in civil confinement. He appealed the conviction, was granted a new trial, and he was held in civilian custody pending his second trial.
4. On 29 August 1977, at his second trial, he changed his plea on a reduced charge of delivery of a controlled substance from not guilty to nolo contendere (heroin). He was sentenced to 5 years in civil confinement. The State noted that State law, a plea of nolo contendere cannot be appealed; therefore, his conviction was final.
5. On 12 October 1977, the applicant's commander notified the applicant that he was being recommended for discharge under the provisions of Army Regulation 635-206 (Personnel Separations - Discharge - Misconduct (Fraudulent Entry, Conviction by Civil Court, [Absent Without Leave] AWOL, Desertion), by reason of his civilian conviction.

6. The applicant's waiver form acknowledging a waiver of his case by a board of officers is signed by his Defense Section and is undated, there is no indication the applicant submitted a statement in his own behalf.

7. On 28 November 1977, the applicant's commander formally recommended the applicant's discharge prior to expiration of his term of service under the provisions of Army Regulation 635-206, by reason of civil conviction.

8. On the same date, the separation authority approved the recommendation and directed the applicant's reduction to pay grade E-1 and discharge under the provisions of Section VI, Army Regulation 635-206, by reason of civil conviction, with his service characterized as UOTHC.

9. On 22 December 1977, the applicant was discharged, he completed 1 year, 1 month, and 7 days of net active service this period. The DD Form 214 he was issued shows he was discharged under the provisions of Section VI, Army Regulation 635-206, in pay grade E-1, and his service was characterized as UOTHC.

10. The applicant provided a Problem List, page 2 of 13, from a VISTA Electronic Medical Documentation, updated on 13 November 2018, showing he was suffering from adjustment disorder with mixed anxiety and depressed mood.

11. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of the previous Army Board for Correction of Military Records (ABCMR) decision(s) summarized in Dockets Number AR20090008456 on 6 August 2009 and AR20190001958 on 24 May 2019. Specifically, he requests his under other than honorable conditions (UOTHC) discharge be upgraded to either an under honorable conditions (general) discharge or an honorable discharge. On his DD Form 149, 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 on 27 September 1974, 2) The applicant appeared before the District Court on 26 May 1976, where he was convicted of the delivery and sale of a controlled substance (heroin). He was sentence to 15 years in civil confinement. He appealed the conviction, was granted a new trial, and he was held in civilian custody pending his second trial. On 29 August 1977, at his second trial, he changed his plea on a reduced charge of delivery of a controlled substance from not guilty to nolo contendere (heroin). He was sentenced to 5 years in civil confinement. The State noted that State law, a plea of nolo contender cannot be appealed; therefore, his conviction was final, 3) On 28 November 1977, the applicant's commander formally recommended the applicant's discharge prior to expiration of his term of service under the provisions of

Army Regulation 635-206, by reason of civil conviction, 4) On 22 December 1977, the applicant was discharged under the provisions of Section VI, AR 635-206.

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. There were no in-service medical records available for review.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions. Review of his Problem List in JLV shows he has been diagnosed with Major Depressive Disorder (MDD), Recurrent, Moderate (recorded on 04 April 2024), Adjustment Disorder with Mixed Anxiety and Depressed Mood (recorded on 29 May 2019), Cannabis Abuse, Uncomplicated (recorded on 22 June 2023), and Cocaine Dependence, Uncomplicated (recorded on 13 November 2018). His VA medical records also show he was diagnosed and treated by psychiatry for PTSD on 30 January 2019 and 01 May 2019. The Criterion A trauma associated with the diagnosis was not specified nor was the date of onset of the condition specified.

e. A Problem List printed at Central Alabama HCS on 06 June 2024 included as part of his application shows he was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood (recorded on 29 May 2019). The available documentation did not associate the condition with his military service.

f. The applicant's previous petitions to the ABCMR as summarized in AR20090008456 on 6 August 2009 and AR20190001958 on 24 May 2019 show that the Board denied his request for relief.

g. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant has been diagnosed with a mitigating BH condition associated with his military service. Although his VA medical records show he has been diagnosed with two potentially mitigating conditions, MDD and PTSD, he has not been service-connected through the VA for any BH conditions, nor were his diagnoses of MDD or PTSD documented to be associated with his military service [*Advisor's Note*: his VA diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood is subsumed by his diagnosis of MDD]. Thus, this Advisor would contend that mitigation for BH reasons is not supported. However, he contends that his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his discharge 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. There were no in-service medical records available for review. Review of his VA medical records show he has been diagnosed with two potentially mitigating BH conditions, PTSD and MDD; however, his treating provider(s) did not specify the date(s) of onset of the conditions nor associate his diagnoses with his military service. Furthermore, he is not service-connected through the VA for any BH conditions. Perhaps more importantly, MDD and PTSD do not impair one's ability to distinguish right from wrong and adhere to the right. Moreover, delivery and sale of a controlled substance are not part of the natural history and sequelae associated with MDD or PTSD. Thus, it is this Advisor's position that discharge secondary to civil conviction for delivery and sale of a controlled substance would not be mitigated by the applicant's claimed condition, even if presumed to have been relevant at the time of conviction/discharge. Thus, BH mitigation is not supported.

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 pattern of misconduct leading to the applicant's separation and the following findings outlined in the medical review:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, 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
:XXX	:XXX	:XXX	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.

//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, 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

3. Army Regulation 635-206, then in effect, provided that an enlisted member, who was convicted by a civilian court of an offense for which the authorized punishment under the Uniform Code of Military Justice included confinement of 1 year or more, was to be considered for elimination. When such separation was warranted, an undesirable discharge was considered appropriate.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//