

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 January 2024

DOCKET NUMBER: AR20220012054

APPLICANT REQUESTS:

- Upgrade of his under other than honorable conditions discharge
- Permission to appear personally before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10 (Armed Forces), United States Code (USC), section 1552 (b) (Correction of Military Records: Claims Incident Thereto). 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, in effect, he completed his first enlistment honorably; however, the Army ultimately discharged him under other than honorable conditions. He opines the primary reason was that the Army did not want to address his behavioral health issues, which he incurred while on active duty and to which the Army had contributed; specifically, he is referring to his alcohol dependency and the mental health concerns that resulted following the death of his roommate, [REDACTED]

3. A review of the applicant's service record reveals the following:

a. On 21 May 1987, the applicant enlisted in the Regular Army for 3 years. Upon completion of initial entry training and the award of military occupational specialty 52D (Power Generation Equipment Repairer), orders assigned him to an air defense artillery unit at Fort Polk, LA; he arrived at his unit on 23 October 1987.

b. On 29 December 1987, the applicant's unit reported him as absent without leave (AWOL). On 4 January 1988, the applicant returned to military control (the applicant's available service record does not reflect if any disciplinary action resulted from his AWOL). Effective 21 July 1989, the applicant's chain of command promoted him to specialist four (SP4)/E-4. On 27 September 1989, the applicant immediately reenlisted for 4 years.

c. In or around January/February 1990, the applicant received reassignment instructions for Korea; on 5 March 1990, he arrived in Korea and was further assigned to a maintenance company, arriving on or about 7 March 1990.

d. In or around June 1991, the applicant's leadership awarded him the Army Achievement Medal as an end-of-tour award. The applicant's DA Form 638-1 (Recommendation for Award) noted the long hours he had spent in ensuring all power generation equipment was repaired in a timely manner, and the recommendation attributed, in part, the unit's three consecutive "Unit of the Quarter" awards to the applicant's efforts.

e. On 20 June 1991, the applicant completed his tour in Korea, and permanent change of station orders sent him to Fort Riley, KS; he arrived at his new duty station on 29 July 1991. On 8 May 1992, a military police (MP) patrol observed a vehicle illegally pass another vehicle; after a pursuit, during which the vehicle illegally passed another MP patrol, the MPs stopped a vehicle and found the applicant was the driver.

(1) The MPs detected the odor of alcohol on the applicant's breath, and he failed a field sobriety test. A search of the vehicle revealed a concealed .380 automatic pistol, with a box of ammunition, and two open containers of beer. A local records check showed the pistol was unregistered.

(2) The MPs transported the applicant to the Provost Marshal's Office, where, during an escape attempt, the applicant ran into and damaged a vehicle. Because the applicant failed a second field sobriety test, the MPs transported him to the military hospital for a blood/alcohol test (BAT); the BAT revealed a blood/alcohol level of 0.1556 percent (in ██████████ a person with a blood/alcohol level of 0.08 or higher is considered intoxicated).

f. On 2 June 1992, the applicant's command preferred court-martial charges against him for Uniform Code of Military Justice (UCMJ) violations; later, on 2 June 1992, the command referred the charges for adjudication by a summary court-martial.

g. On 17 June 1992, the summary court-martial officer assigned to the applicant's case signed a memorandum delaying the applicant's summary court-martial; the reason

cited was the applicant's emotional distress following the death of his friend, Specialist

h. On 26 June 1992, and consistent with the applicant's pleas, a summary court-martial found the applicant guilty of UCMJ violations.

(1) The court convicted the applicant of the following charges:

(a) Article 92 (Violating a Lawful General Regulation), two specifications – On 8 May 1992, the applicant violated two Fort Riley regulations by respectively fleeing an MP vehicle after an instruction to stop and failing to register a privately-owned pistol.

(b) Article 111 (Operating a Vehicle while Drunk), one specification – On 8 May 1992 the applicant operated a vehicle while drunk.

(c) Article 134 (General Article – Carrying a Concealed Weapon) – On 8 May 1992, the applicant was unlawfully carrying a concealed pistol.

(2) The court sentenced the applicant to 45-days' restriction, forfeiture of \$523 per month for one month, and reduction to private (PV1)/E-1; the summary court-martial officer recommended the sentence's suspension for three months.

(3) On 9 July 1992, the summary court-martial convening authority approved the applicant's sentence and ordered its execution but directed the suspension of the applicant's forfeiture for three months.

i. On 28 July 1992, the applicant underwent a separation physical.

(1) On his Standard Form (SF) 93 (Report of Medical History), the applicant stated his leadership had sent him for mental health counseling following the death of his roommate in June 1992; the applicant was present when his roommate drowned in a local creek. In addition to the counseling he received, medical authority prescribed the applicant pills to help him sleep.

(2) The applicant's SF 88 (Report of Medical Examination) shows the examining physician's assistant (PA) found the applicant qualified for separation, with no defects or diagnoses noted.

j. On 3 August 1992, the applicant accepted nonjudicial punishment under the provisions of Article 15, UCMJ for violating a colonel's order not to operate his privately-owned vehicle on post; punishment consisted of a forfeiture of \$392 per month for two months and 45-day's restriction and extra duty.

k. On 4 August 1992, a PA completed a DA Form 3822-R (Report of Mental Status Evaluation) on the applicant; the report indicated the applicant met the medical retention standards outlined in Army Regulation (AR) 40-501 (Standards of Medical Fitness).

l. The applicant's separation packet is unavailable for review; however, the applicant's service record includes his DD Form 214 (Certificate of Release or Discharge from Active Duty), which shows that, on 13 October 1992, the Army discharged the applicant from active duty under other than honorable conditions. The DD Form 214 additionally reflects the following:

- Item 12c (Net Active Service This Period) – 5 years, 4 months, and 17 days
- Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon, National Defense Service Medal, Army Good Conduct Medal (1st Award), Overseas Service Ribbon, Army Achievement Medal, and two marksmanship qualification badges
- Item 18 (Remarks) – Reflected the applicant's continuous honorable service from 19870521 to 19890926
- Item 25 (Separation Authority) – "AR 635-200 (Personnel Separations – Enlisted Personnel), PARA 14-12C (Acts or Patterns of Misconduct – Commission of a Serious Offense"
- Item 26 (Separation Code) – "JKQ" (Misconduct)
- Item 28 (Narrative Reason for Separation – "MISCONDUCT – COMMISSION OF A SERIOUS OFFENSE"

m. On 23 May 1994, the applicant petitioned the Army Discharge Review Board (ADRB), requesting an upgraded character of service.

(1) The applicant argued his undesirable discharge had severely punished him, and the punishment continued even though he was now a civilian. He provided a copy of a training certificate reflecting his successful completion of a Generator and Engine course.

(2) The ADRB's Case Report and Directive shows the following:

(a) The ADRB analyst provided a timeline for the applicant's separation processing:

- 19920807 – Unit commander notified the applicant that separation action had been initiated under chapter 14 (Separation for Misconduct), AR 635-200; (the ADRB analyst did not identify the specific misconduct that served as the basis for the applicant's separation)

- 19920807 – Applicant acknowledged notification, consulted with legal counsel, and requested a hearing before a board of officers; he did not submit statements in his own behalf
- 19920915 – The separation authority disapproved the applicant's conditional waiver request
- 19920930 – Applicant acknowledged notification, waived legal counsel, waived his right to a board, and did not submit statements in his own behalf
- 19921008 – Separation authority approved the applicant's separation under other than honorable conditions

(b) On 12 November 1996, after conducting a records review, the ADRB voted to deny relief; however, the ADRB noted the narrative reason for separation listed on the applicant's DD Form 214 did not comply with AR 635-5-1 and directed the issuance of a new DD Form 214 with the appropriate entry.

4. AR 15-185 (ABCMR) states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

5. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced mental health conditions that mitigated 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: 1) The applicant enlisted in the Regular Army on 21 May 1987; 2) On 2 June 1992, the applicant's command preferred court-martial charges against him. On 17 June 1992, the summary court-martial officer assigned the applicant's case signed a memorandum delaying the applicant's summary court-martial. The reason cited was the applicant's emotional distress following the death of his friend; 3) On 26 June 1992, and consistent with the applicant's pleas, a summary court-martial found the applicant guilty of UCMJ violations of: A) two specifications of violating a lawful general regulation by fleeing an MP vehicle after an instruction to stop and failing to register a privately-owned pistol on 08 May 1992; B) one specification of operating a vehicle while drunk on 08 May 1992 and C) unlawfully carrying a concealed pistol on 08 May 1992; 4) The applicant was discharged on 13 October 1992, Chapter 14-12C (Acts or Patterns of Misconduct – Commission of a Serious Offense. His service was characterized as UOTHC.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed the supporting documents and the applicant's military service and available

medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided.

d. On his application, the applicant contends mental health conditions including alcohol dependency were contributing and mitigating factors in the circumstances that resulted in his separation. There is evidence the applicant was exposed to a difficult event (i.e., death of a friend and fellow service member) as he reported in his application, and as a result, he was experiencing symptoms of depression and anxiety. There was evidence in his military record that his court martial was delayed due to this event. He also reported, on 28 July 1992, during his report of medical history, that he was treated for depression and loss of sleep at the end of June 1992 by Irwin Army Hospital. Specifically, he described receiving "counseling and given pills to help with sleep." The applicant was seen for a mental status evaluation as part of his Chapter proceedings on 04 August 1992. He was not diagnosed with a mental health condition, found to have the mental capacity to understand and participate in the proceedings, and was mentally responsible.

e. A review of JLV was void of mental health documentation, and the applicant receives no service-connected disability. The applicant did not provide any additional medical documentation from a licensed behavioral health provider.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing mental health conditions including alcohol dependency that contributed to his misconduct. There was evidence the applicant was reporting depression and anxiety symptoms related to a loss of a fellow service member while on active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including alcohol dependency that contributed to his misconduct while on active service. There was evidence the applicant was reporting depression and anxiety symptoms related to a loss of a fellow service member while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was reporting symptoms of depression and anxiety related to a distressing event that occurred while he was on active service, and he did report getting initial counseling and psychiatric medication to assist him with

these negative emotions. The applicant may have also been utilizing alcohol to self-medicate and avoid his negative emotions. However, there is no nexus between depression and anxiety and his misconduct of fleeing from military police, failing to register a privately-owned pistol, operating a vehicle while drunk, and unlawfully carrying a concealed pistol: 1) these types of misconduct are not part of the natural history or sequelae of his reported mental health conditions; 2) His reported mental health conditions do not affect one’s ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing 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. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, 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 BH 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

4/1/2024

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, USC, 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, USC, section 1556 (Ex Parte Communications Prohibited) provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. AR 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 3-7a (Honorable Discharge) stated an honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying

entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. Paragraph 3-7b (General Discharge). 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 14-12c applied to Soldiers who had committed a serious military or civilian offense where the specific circumstances warranted separation and the Manual for Courts-Martial authorized a punitive (i.e., bad conduct or dishonorable) discharge.

4. The Manual for Courts-Martial in effect at the time included a punitive discharge among the maximum punishments for the following UCMJ Articles: 92 (Failure to Obey a Lawful General Regulation), 111 (Drunken Driving), and 134 (General Article – Carrying a Concealed Weapon).

5. 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 to 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.

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, 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.

7. AR 15-185 states:

a. The ABCMR decides cases on the evidence of record; it is not an investigative body. Additionally, the ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary). The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning there is a greater than a 50 percent chance that what an applicant's claims is true.

b. An applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

8. AR 600-8-104, in effect at the time, required case files for approved separation actions to be maintained in the affected Soldiers' military personnel file.

//NOTHING FOLLOWS//