

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 October 2023

DOCKET NUMBER: AR20230002719

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

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

- DD Form 293 (Application for the Review of Discharge)
- Department of Veterans Affairs Letter

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 his current discharge was due to his actions outside of his military duties and off base. His mental health and physical disability (left knee surgery/in a cast) were impaired. He requests that these considerations be taken into account.
3. Having had prior service in the USAR, the applicant enlisted in the Regular Army on 12 March 1991 for six years. He attained the rank/grade of specialist/E-4 on 1 June 1992.
4. The applicant served in Korea from 24 March 1992 through 18 March 1993.
5. An Incident Report, dated 29 March 1994, shows the applicant was arrested for dealing in stolen property/grand theft on 16 February 1994. The investigation shows the applicant had stolen his roommate's property (dual cassette player) and attempted to pawn the items.
6. The applicant was placed in confinement (civil authority) on 30 March 1994.

7. The applicant's immediate commander notified him on 19 May 1994, that he was initiating action to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 14, for misconduct-commission of a serious offense. The reason for the proposed action was the applicant had been arrested and incarcerated for dealing in stolen property. His commander recommended he receive a general discharge. The applicant acknowledged receipt of the notification on the same date.

8. The applicant underwent a mental status evaluation on 31 May 1994, which shows he was mentally fit for separation from active duty.

9. The applicant consulted with legal counsel on 24 June 1994 and was advised of the basis for his separation and the procedures and rights that were available to him. He requested a personal appearance before an administrative separation board and representation by counsel.

a. He acknowledged that he may expect to encounter substantial prejudice in civilian life if discharged under honorable conditions (general).

b. He elected to submit a statement in his own behalf; however, the statement is not available for review.

10. The applicant's immediate commander formally recommended the applicant be separated under the provisions of AR 635-200, Chapter 14. The commander stated the applicant has not demonstrated the smallest amount of potential for useful service in the Army. He had been involved in dealing in stolen property, and larceny. His commander recommended his service be characterized as general. His chain of command recommended separation with a general characterization of service.

11. The separation authority approved the recommended discharge on 30 June 1994, and directed that the applicant be separated with a general, under honorable conditions discharge.

12. The applicant was discharged on 7 July 1994. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, for misconduct. He was assigned Separation Code JKD with Reentry Code 4. His service was characterized as under honorable conditions (general). He completed 3 years, 1 month, and 29 days of net active service. He had lost time from 29 March 1994 to 24 June 1994 (civil confinement). His awards include the Army Service Ribbon, National Defense Service Medal, and the Overseas Service Ribbon.

13. Soldiers are subject to separation under the provisions AR 635-200, Chapter 14, for misconduct. A discharge under other than honorable conditions (UOTHC) is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the overall record.

14. The applicant provides a Department of Veterans Affairs letter, dated 6 December 2022, that shows the applicant has one or more service-connected disabilities, his combined service-connected evaluation is 90%. He is unemployable due to his service-connected disabilities, and he is considered to be totally and permanently disabled solely due to his service-connected disabilities.

15. 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.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requests reconsideration of his request for an upgrade of his character of service. He asserts he was experiencing a mental health condition during his active service, which contributed to 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 having had prior service in the USAR enlisted in the Regular Army on 12 March 1991; 2) The applicant was arrested for dealing in stolen property/grand theft on 16 February 1994. Also, the applicant was placed in confinement (civil authority) on 30 March 1994; 3) The applicant was discharged on 7 July 1994, Chapter 14-12c, for misconduct. His service was characterized as under honorable conditions (general).

c. The Army Review Board Agency (ARBA) Medical 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.

d. The applicant noted a mental health condition as a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported mental health symptoms while on active service. The applicant underwent a mental status evaluation on 31 May 1994, which found him was mentally fit for separation from active duty. A review of JLV provided evidence the applicant been diagnosed with service-connected anxiety disorder (70%) since 2015.

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

**Kurta Questions:**

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant contends he was experiencing a mental health condition that contributed to his misconduct, and he has been diagnosed with service-connected anxiety disorder since 2015.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing a mental health condition that contributed to his misconduct, and he has been diagnosed with service-connected anxiety disorder since 2015.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing anxiety while on active service. However, there is no nexus between anxiety and the applicant's misconduct of theft given that: 1) this type of misconduct is not part of the natural history or sequelae of anxiety; 2) anxiety does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

**BOARD DISCUSSION:**

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board considered the reason for his separation and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors for the misconduct. Documentation provided by the applicant does not reveal post-service accomplishment or letters of support to weigh in support of a clemency determination. After due consideration of the request, the Board determined that the evidence presented does not meet applicable regulatory guidance and there is no basis upon which to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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.

█

█ █

---

█

█

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, 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 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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.

4. 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 Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (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.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 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//