

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 August 2024

DOCKET NUMBER: AR20230003157

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) discharge
- amendment of his narrative reason for separation

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Counsel Statement
- Department of Veterans Affairs (VA) Disability Rating
- VA Medical Records
- Army Review Boards Agency Class Action Letters

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. Counsel states the applicant performed exceptionally well during much of his time in the Army. He excelled during his training at bootcamp and graduated at the top of his class. Additionally, he did well at AIT and was tasked with helping Soldiers outside of the classroom.

a. His first duty station was in South Korea where he was awarded an Army Achievement Medal (AAM) and later a second AAM. When assigned to a unit in Germany he almost immediately ran into issues with his new unit. The unit was highly disorganized, and his peers were jealous that he had Air Assault wings because no one else had them. Moreover, the applicant's fiancé was in Heidelberg, which was several hours away from where he was stationed in Germany. He began to feel alone and depressed at this time.

b. Despite being afforded a rehabilitation transfer he developed feelings of depression and growing feelings of hopelessness about his situation. He was threatened by a First Sergeant (1SG) who suspected him of having an affair with his wife worsening his mental state.

c. His medical evaluation board process as interrupted because the 1SG took retaliatory actions against him.

d. He was stopped by MPs while he was driving and gave him a breathalyzer test. His BAC was .005, well below the legal limit. However, he was still punished for a DUI and as a result, administratively processed out of the Army with a General Discharge.

3. On the applicant's DD Form 149, he indicates other mental health as an issue/condition related to his request.

4. The applicant enlisted in the Regular Army on 17 March 2000.

5. Between 3 October 2001 and 11 January 2003, the applicant was formally counseled on 10 occasions for various infractions including driving related incidents, driving under the influence, failure to follow orders, and breaking restriction.

6. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice on the following dates for the indicated offenses:

- 7 February 2002, for unauthorized changes to the Force Protection Guard Roster; his punishment was 7 day extra duty and 7 days of restriction
- 12 March 2002, for breaking restriction; his punishment included reduction to E-2, forfeiture of \$289.00, restriction for 14 days, and 14 days of extra duty
- 8 April 2003, for disobeying a lawful order by driving a privately owned vehicle with suspended privileges and operating a vehicle while drunk: his punishment included reduction to E-1, forfeiture of \$575.00 for two months, restriction for 45 days, and 45 days of extra duty

7. On 5 February 2003, the applicant received a permanent profile for flat feet and referred to a military occupational specialty retention board. The final determination of this board is not available.

8. The applicant was referred to and enrolled in the Army Drug and Alcohol Prevention Program on 10 March 2003. In addition to abstaining from all alcohol and illicit drugs he was to attend anger and stress management programs.

9. A Mental Status report dated 16 March 2003, shows the applicant had no abnormalities in behavior, level of orientation, mood, thinking process, thought content, or memory. He was determined to be mentally capable to understand and participate in the proceedings deemed appropriate by command.

10. A Medical Examination found no abnormalities except for his bilateral flat feet and a skin condition.

11. The applicant's immediate commander notified the applicant, on 30 April 2003, of his intent to initiate actions to separate him under Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14- 12b, a pattern of misconduct. His commander noted the specific reasons as his three NJPs and failure to obey orders.

12. The applicant consulted with legal counsel on 25 April 2003. He was advised of the basis for the contemplated discharge, the possible effects of an under honorable conditions discharge, and the procedures and rights that were available to him. He initially elected to submit a statement in his own behalf; however no statement is available for the Board to review.

13. The applicant's immediate commander formally recommended his separation from service on 1 May 2003, under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12b recommending he receive a general discharge.

14. The appropriate authority approved the discharge recommendation under Army Regulation 635-200, paragraph 14-12b, waived further rehabilitative, directed he not be transferred to the Individual Ready Reserve, and the applicant be issued a General Discharge Certificate.

15. The applicant was discharged on 23 May 2003. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 14, for misconduct and his service was characterized as under honorable conditions (General). He completed 3 years, 4 months, and 3 days of active service. His awards are listed as National Defense Service Medal, Army Service Ribbon ,and the Overseas Service Ribbon.

16. The Army Discharge Review Board denied the applicant's request for an upgrade on 29 July 2013.

17. The applicant provides:

a. A personal accounting of his service and the incidents that led to his discharge. In this statement he alleges he was awarded two Army Achievement Medal, the Driver's

and Mechanics Badge, he was promoted to E-4, and was referred to a medical board for as skin condition, flat feet and a bad knee; however, there is documentation to support these contentions.

b. A VA disability decision dated 1 March 2019 affording him a 100% evaluation for major depression and a 50% evaluation for migraines.

18. In determining whether to grant relief the Boards for Correction of Military/Naval Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

19. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting a reconsideration of an upgrade to his under honorable conditions (general) to honorable and a change to his narrative reason for separation. He contends he experienced an undiagnosed mental health condition 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 17 March 2000.
- The applicant was counseled on 10 occasions between October 2001 and January 2003, and accepted NJP for the following: unauthorized changes to the Force Protection Guard Roster; breaking restriction; and disobeying a lawful order by driving a privately owned vehicle with suspended privileges and operating a vehicle while drunk.
- On 30 April 2003, his commander notified him of intent to initiate actions to separate him under Army Regulation 635-200, Chapter 14, paragraph 14- 12b, a pattern of misconduct. His commander noted the specific reasons as his three NJPs, and failure to obey orders.
- The applicant was discharged on 23 May 2003. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 14, for misconduct, and he was credited with 3 years, 4 months, and 3 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he began feeling depressed and isolated while stationed in Germany because he was not accepted by his peers and was separated from family and his fiancé. A VA Rating Decision letter dated 1 March 2019 showed a continuation of a rating of 100% disabling for Major Depression. The application also included a Mental

Disorders Disability Benefits Questionnaire (DBQ) as a review exam dated 23 September 2018, which showed a diagnosis of Major Depressive Disorder, severe. The applicant reported increased relationships stressors, unemployment, depressed mood, anxiety, sleep impairment, panic attacks, and suicidal ideation. A document labeled Rehabilitation Team Meeting indicated the applicant had been referred to ADAPT, anger management, and stress management in April 2003. A Mental Status Report dated 16 April 2003 showed that the applicant was evaluated for administrative separation and was deemed to meet retention standards from a mental health perspective, and he was psychiatrically cleared for administrative action. A Report of Medical Examination (separation exam) signed on 30 April 2003 showed that the applicant endorsed depression or excessive worry. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed documentation of the Mental Status Examination conducted on 16 April 2003 as part of the separation process. Documentation indicated the applicant only discussed his DUI and that his lawyer was appealing it. He did not report any mental health problems or concerns. The applicant initially engaged mental health care at the VA on 24 December 2014, and his primary complaint was psychological adjustment to an unidentified skin condition on his face and scalp. Documentation discussed how this interferes with social and occupational functioning as well as anger management problems primarily within his work environment. He was diagnosed with Major Depressive Disorder. He had four follow up sessions that focused on frustrations with work, going through compensation and pension evaluation, and his skin condition. He reengaged with mental health treatment on 17 August 2018, and he reported symptoms of depression dating back to 2003 but worsening since a medical diagnosis and surgery in October 2017. He reported a suicide attempt by walking into the ocean even though he cannot swim in April 2018, and he reported continuing to feel as though he does not want to live. The next eight sessions focused on his job search, legal problems (charged with grand larceny), and excessive alcohol use. He initiated alcohol abuse treatment on 19 November 2018, and he was started on a medication to help with sleep and mood. He engaged in group therapy from November 2018 through February 2019, and he also utilized services through the Veteran Justice Outreach (VJO) and the Vocational Rehabilitation programs. From 2019 through 2024, the applicant routinely engaged in mental health treatment with medication and psychotherapy, and he utilized other VA programs, including the homeless program, compensated work therapy, and VJO. He reengaged with group therapy for alcohol abuse and maintained sobriety. His most recent contact with VA mental health was a group therapy session for alcohol treatment on 14 March 2024, and his diagnosis was Alcohol Dependence, in remission. Records show he is 100% service-connected for Major Depressive Disorder, and his last prescription for medication was in 2021.

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. There are no mental health records from his time on active service, but there are records from the VA indicating a diagnosis of Major Depressive Disorder in 2014. The applicant is also 100% service-connected for this condition.

(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. While VA documentation does show a service-connected diagnosis of Major Depressive Disorder, documentation in the VA record indicates the onset of symptoms occurred in 2003 after the applicant was discharged from the military. Additionally, there is no nexus between his asserted mental health condition and his misconduct related to failure to obey orders: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health condition does not affect one's ability to distinguish right from wrong and act in accordance with the right.

g. 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. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct with the commander citing several incidents of nonjudicial punishments. The Board reviewed and concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. The Board found no error or injustice in the separation proceedings and designated characterization of service

assigned during separation. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. Additionally, the Board found no error or injustice in the narrative reason for separation and determined amendment was not warranted.

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.

10/28/2024

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. Title 10, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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. Army Regulation 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

d. Paragraph 14-12b (A pattern of misconduct) states a Soldier may be discharged for pattern of misconduct consisting of one of the following:

(1) Discreditable involvement with civil or military authorities.

(2) Discreditable conduct and conduct prejudicial to good order and discipline including conduct violating the accepted standards of personal conduct found in the UCMJ, Army regulations, the civil law, and time-honored customs and traditions of the Army.



4. 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. 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//