

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230005178

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) discharge
- a video/telephonic appearance before the Board

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

DD Form 149 (Application for Correction of Military Record)

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 had seizures while in service and was taking Dilantin. This medication affected him mentally and physically. He did not know the side effects of the medication at the time, which altered his decision making at the time. He continues to take Dilantin to this day. He served his country honorably. He annotates other mental health issues (OMHI) are related to his request.
3. The applicant enlisted in the Regular Army on 10 January 1984. He initiated an immediate reenlistment on 19 January 1988.
4. He served in the Republic of Korea from 31 May 1984 to 7 December 1985 and Germany from 21 March 1988 to 23 November 1989.
5. The applicant's record contains Physical Profile Board Proceeding (Permanent Profile), dated 5 January 1987, which reflects a physical defect of "seizure disorder." His PULHES (the acronym used to address factors comprising the Military Physical Profile Serial System) was rated as "3-1-1-1-1-1," indicating he had a medically recorded deficiency related to his physical capacity or stamina (P) however, he had no medically recorded deficiencies related to his upper extremities (U), lower extremities (L); hearing and ears (H); eyes (E); or psychological or psychiatric condition (S).

6. Memorandum, subject Medical Evaluation Board/Physical Evaluation Board Referral shows the applicant was evaluated on the abilities to perform the physical requirements of his military occupational specialty (MOS) and based on a thorough review of the applicant's permanent physical profile, dated 5 January 1987, and other pertinent records and report , the MOS/Medical Retention Board (MMRB) determined that the limitations imposed by his permanent profile were prohibitive, they preclude retraining and reclassification into any MOS which the Army has a requirement. The applicant was directed to be scheduled for a medical evaluation board (MEB).
7. Memorandum, subject: Summary of MOS/MMRB Proceedings, dated 17 April 1987, shows that the applicant's MMRB convened on 7 April 1987 and finds the applicant's medical conditions prevent his performance in primary MOS duties in a worldwide field environment but may be improved enough through a program of rehabilitation and physical therapy for the Soldier to become deployable worldwide. The MMRB recommended that the applicant be placed in a probationary status for 6 months with a reevaluation at the end of the period.
8. The applicant was formally counseled on 8 July 1988, for reasons including but not limited to failure to be at his appointed place of duty on or about 7 July 1988.
9. A letter, dated 28 July 1988, from Plaza Finance Company INC. to the applicant's commander shows the applicant had a loan with the office in the amount of \$145.00 and was four payments in arrears on his \$29.00 monthly payments.
10. Memorandum for Record (Verbal Counseling), dated 2 August 1988, shows the applicant was counseled for his accountability and notified if the problem persisted, he would be formally counseled.
11. Memorandum, subject: Verbal Counseling of Applicant, dated 12 December 1988 shows:
  - a. The applicant was interviewed by his commander regarding an alleged Domestic Assault (Article 128, Uniform Code of Military Justice (UCMJ)), which occurred on 27 November 1988. He admitted that he assaulted his wife on that date. He felt justified as she was pregnant and "copping an attitude." He felt that he should not have to put up with such behavior and was justified in assaulting her. His commander informed him that he would consider UCMJ action and administrative separation under Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) should there be any further disciplinary problems.
12. The applicant was formally counseled on 11 April 1989 for disrespect to a non-commissioned officer and parking in a fire lane behind building 3738 on or about 10 April 1989.

13. A letter, dated 3 August 1989, from Merchants National Banks & Trust Company Community Bank shows on 1 June 1989 the applicant's checking account was overdrawn by \$633.81. His account was closed effective of the letter date and to cease writing checks/withdrawals against his account. The applicant's commander through memorandum, dated 5 June 1989, informed the applicant of his suspended check-cashing privileges.

14. He accepted nonjudicial punishment on:

a. 1 August 1989 for failure to obey a lawful regulation, to wit; allowing an intoxicated individual to operate a USAREUR plated vehicle.

b. 1 August 1989 for failing to go at the time prescribed to his appointed place of duty, to wit: Aid Screening Branch.

15. On 8 September 1989, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of AR 635-200, paragraph 14-12a, for misconduct. The commander's cited disciplinary infractions, to wit: domestic assault on 27 November 1988 (Violation of Article 128, UCMJ); on or about 11 April 1989, you were disrespectful towards an NCO; on or about 2 June 1989, you failed to obey a lawful order (Violation of Article 92, UCMJ); on or about 18 July 1989, you were absent from your appointed place of duty (Violation of Article 86, UCMJ); letters of indebtedness dated 20 January 1989, 13 April 1989, 18 April 1989 (two), 19 April 1989, and 28 July 1989.

16. On 15 September 1989, the applicant's commander formally recommended his separation, under the provisions of AR 635-200, Chapter 14-12a, due to misconduct for the same reasons as listed above.

17. Subsequently, the applicant's commander, on 18 September 1989, recommended approval of his separation from service, under the provisions of AR 635-200, paragraph 14-12c.

18. On 22 September 1989, the separation authority approved the applicant's discharge and directed the applicant's service be characterized as under honorable conditions and will be issued a General Discharge Certificate (DD Form 257A).

19. Accordingly, the applicant was discharged on 27 November 1989. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12a, by reason of misconduct – minor disciplinary infractions with a separation code of JKN and reentry code of 3, -3c.

He completed 5 years, 10 months, and 18 days of active service. His service was characterized as under honorable conditions (General). He was awarded or authorized:

- Army Service Ribbon
- Good Conduct Medal
- Overseas Service Medal
- Expert Marksmanship Qualification Badge with Pistol Bar (.45 cal)
- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- Marksman Marksmanship Qualification Badge with Grenade Bar

20. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

21. Based on the applicant's conditions the Army Review Board Agency medical staff provided a medical review for the Board members. See "MEDICAL REVIEW" section. ARBA does not routinely provide copies of ARBA Medical Office Recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military applicants (and/or their counsel) prior to adjudication.

#### MEDICAL REVIEW:

a. The applicant is requesting an upgrade of his Under Honorable Conditions discharge contending that his misconduct was due to his medical condition. Applicant indicates he suffered from seizures while in the service and was taking phenytoin (Dilantin).

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army on 10 January 1984. He initiated an immediate reenlistment on 19 January 1988. He served in the Republic of Korea from 31 May 1984 to 7 December 1985 and Germany from 21 March 1988 to 23 November 1989.
- The applicant's record contains Physical Profile Board Proceeding (Permanent Profile), dated 5 January 1987, which reflects a physical defect of "seizure disorder." His PULHES (the acronym used to address factors comprising the Military Physical Profile Serial System) was rated as "3-1-1-1-1-1," indicating he had a medically recorded deficiency related to his physical capacity or stamina (P) however, he had no medically recorded deficiencies related to his upper extremities (U), lower extremities (L); hearing and ears (H); eyes (E); or psychological or psychiatric condition (S).

- Memorandum, subject Medical Evaluation Board/Physical Evaluation Board Referral shows the applicant was evaluated on the abilities to perform the physical requirements of his military occupational specialty (MOS) and based on a thorough review of the applicant's permanent physical profile, dated 5 January 1987, and other pertinent records and report, the MOS/Medical Retention Board (MMRB) determined that the limitations imposed by his permanent profile were prohibitive, they preclude retraining and reclassification into any MOS which the Army has a requirement. The applicant was directed to be scheduled for a medical evaluation board (MEB).
- Memorandum, subject: Summary of MOS/MMRB Proceedings, dated 17 April 1987, shows that the applicant's MMRB convened on 7 April 1987 and finds the applicant's medical conditions prevent his performance in primary MOS duties in a worldwide field environment but may be improved enough through a program of rehabilitation and physical therapy for the Soldier to become deployable worldwide. The MMRB recommended that the applicant be placed in a probationary status for 6 months with a reevaluation at the end of the period.
- The applicant was formally counseled on 8 July 1988, for reasons including but not limited to failure to be at his appointed place of duty on or about 7 July 1988. A letter dated 28 July 1988, from Plaza Finance Company INC. to the applicant's commander shows the applicant had a loan with the office in the amount of \$145.00 and was four payments in arrears on his \$29.00 monthly payments. Memorandum for Record (Verbal Counseling), dated 2 August 1988, shows the applicant was counseled for his accountability and notified if the problem persisted, he would be formally counseled.
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August 1989 for failing to go at the time prescribed to his appointed place of duty, to wit: Aid Screening Branch.

- On 8 September 1989, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of AR 635-200, paragraph 14-12a, for misconduct. The commander's cited disciplinary infractions, to wit: domestic assault on 27 November 1988 (Violation of Article 128, UCMJ); on or about 11 April 1989, you were disrespectful towards an NCO; on or about 2 June 1989, you failed to obey a lawful order (Violation of Article 92, UCMJ); on or about 18 July 1989, you were absent from your appointed place of duty (Violation of Article 86, UCMJ); letters of indebtedness dated 20 January 1989, 13 April 1989, 18 April 1989 (two), 19 April 1989, and 28 July 1989. On 15 September 1989, the applicant's commander formally recommended his separation, under the provisions of AR 635-200, Chapter 14-12a, due to misconduct for the same reasons as listed above.
- The applicant was discharged on 27 November 1989. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12a, by reason of misconduct – minor disciplinary infractions with a separation code of JKN and reentry code of 3, -3c.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, his ABCMR Record of Proceedings (ROP), and documents from his service record and separation packet. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. Due to the applicant's period of service, there are no electronic active-duty medical records. Applicant did not provide any hard copy military or civilian medical records.

e. The VA electronic medical record (JLV) indicates that the applicant is 10% service connected for Seizure Disorder. On 30 Nov 2023, the diagnosis of Epilepsy, unspecified, not intractable, without status epilepticus was added to his Problem List.

f. A 22 Feb 2012 Neurology note documents that the applicant's seizure disorder dates back to 1984 when, while on a transport plane to Korea, he passed out and, per witnesses, had a grand mal seizure. He was subsequently evaluated by neurology and underwent a lumbar puncture, EEG, and neuroimaging but no cause could be ascertained. He was started on Dilantin (phenytoin), a seizure medication, at this time. As of this 2012 Neurology visit, he reported a seizure frequency of one seizure every two years. His most recent seizure was a year and a half ago. During his visit, his

Dilantin level was noted to be subtherapeutic. Applicant indicated that he forgets to take his medication three to four times week.

g. During his most recent Neurology visit on 29 Nov 2023, the applicant reported the following side effects from the Dilantin: memory concerns, slurred speech, fatigue, feeling off balance. Despite these side effects, he was adamant in his desire to remain on Dilantin as he had been seizure-free for years. It was documented that he had been counseled about the adverse effects of Dilantin: osteoporosis, neuropathy, irreversible cerebellar degeneration resulting in balance problems.

h. Based on the available information, it is the opinion of the Agency Medical Advisor that the applicant's diagnosis of Seizure Disorder and treatment with Dilantin, mitigates some of his misconduct. As there is an association between use of Dilantin and impaired memory/concentration/forgetfulness, there is a nexus between his use of Dilantin, his failure to report, his failure to pay his bills and his failure to maintain a positive checking account bank balance. Seizure DO and use of Dilantin do not mitigate the offense of domestic assault. While acts of minor violence can rarely occur during a seizure, these acts are typically random, spontaneous, disorganized, and unfocused. Notably, after the seizure has passed, the seizure patient is typically amnesic for the event. In the applicant's case, documentation indicates that the applicant's acts of domestic violence were not spontaneous or unpremeditated, his choice of victim was not accidental, his behavior reflected motivation and rationalization and the applicant could recall and coherently speak of the events prior to, during and after the event. It is also highly unlikely that the applicant's medication, Dilantin, contributed to his acts of domestic violence given that Dilantin does not disinhibit behavior but, rather, suppresses behavior through the side effects of sedation and lethargy.

#### Kurta Questions:

(1) Does any evidence state that that the applicant had a condition or experience that may excuse or mitigate the discharge? Yes. Applicant is diagnosed with a Seizure Disorder and is being treated with Dilantin.

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

(3) Does the condition or experience excuse or mitigate the discharge? Partially. As there is an association between use of Dilantin and impaired memory/concentration/forgetfulness, there is a nexus between his use of Dilantin, his failure to report, his failure to pay his bills and his failure to maintain a positive checking account bank balance.

i. Seizure DO and use of Dilantin do not mitigate the offense of domestic assault, however. While acts of minor violence can rarely occur during a seizure, these acts are

typically random, spontaneous, disorganized, and unfocused. Notably, after the seizure has passed, the seizure patient is typically amnesic for the event. In the applicant's case, documentation indicates that the applicant's act(s) of domestic violence was (were) not spontaneous or unpremeditated, his choice of victim was not accidental, his behavior reflected motivation and rationalization and the applicant could recall and coherently speak of the events prior to, during and after the event. It is also highly unlikely that the applicant's medication, Dilantin, contributed to his acts of domestic violence given that Dilantin does not disinhibit behavior but, rather, suppresses behavior through the side effects of sedation and lethargy.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board concurred with the medical advisor's review finding a partial nexus between the minor infractions by the applicant; however, finding no mitigation for the more serious offenses. The Board determined the characterization 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.

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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 (AR) 635-200 (Personnel Separations – 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. Chapter 14 of this regulation 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 (UOTHC) was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.
3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.
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 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, on 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

6. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

7. AR 15-185 (ABCMR), paragraph 2-11, states applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//