

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 February 2024

DOCKET NUMBER: AR20230005223

APPLICANT REQUESTS:

- an upgrade of his general, under honorable conditions discharge to honorable
- a personal appearance before the Board

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

- DD Form 293 (Application for the Review of Discharge)
- Department of Veterans Affairs (VA) Letter, dated 27 July 2020
- University Honor Society Certificate
- Associate Degree in Arts
- Letter from University Assistant Director

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 marked "character" on his DD Form 293 for action requested and indicated that post-traumatic stress disorder (PTSD) was an issue related to his request; however, no further statements were made.
3. The applicant provides:
 - a. A VA letter from Dr. [REDACTED], dated 27 July 2020, which states the applicant is under his care for anxiety and depression with a 50% service connected disability rating.
 - b. Three documents related to his education include:
 - Honor Society Certificate, dated 31 January 2022
 - Associate in Arts Degree, dated 11 December 2022
 - [REDACTED] Enrollment Letter for Labor and Employment Relations Program

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 23 June 2015.

b. On 11 October 2017, the applicant accepted nonjudicial punishment for one specification of failure to be at his appointed place of duty. His punishment included reduction to private E-2 suspended for 6 months.

c. On 2 February 2018, the suspended reduction to private E-2 was vacated based on the applicant's disrespectful language towards a noncommissioned officer.

d. On 19 April 2018, the applicant's immediate commander notified the applicant of his intent to separate her under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense. The reasons for his proposed action were due to the applicant assaulting a bouncer and subsequently being charged with disorderly conduct on 11 February 2018. The applicant acknowledged receipt on the same day.

e. On 30 April 2018, after consulting with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a character of service that is less than honorable was issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he will be ineligible to apply for enlistment for a period of 2 years after discharge
- he elected to submit matters on his own behalf

f. The applicant provided a statement which indicated the incident did not properly represent him. He did not want to return home as there was nothing positive for him there. He believed he could continue to build his career with the help he has been receiving from his new supervisor, the medication he had been prescribed, and the behavioral health therapy received since May of 2017.

(1) He was hindered by the medical board; however, he had hoped to continue to do great things when he separated. The applicant further noted the bouncer appeared to be intoxicated and made him uncomfortable by being aggressive and taking pictures. He felt threatened and asked the bouncer to get the camera out of his face. The bouncer asked them to leave, but as they proceeded out of the door, the bouncer struck him in the face twice and he reacted in a defensive manner. The police

report clearly indicated the applicant was calm and in full control. He has yet to defend himself in court.

(2) He hopes to remain a Soldier in the Army and commits to continued therapy in behavioral health and communicating with his leadership. He will not take a second chance lightly. The applicant also provided a corroborating statement from a witness.

g. The immediate commander initiated separation action against the applicant under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offense. The commander recommended a general, under honorable conditions discharge and the intermediate commanders recommended approval.

h. A memorandum from Major [REDACTED], Senior Defense Counsel, dated 3 May 2018, notified the commander that the applicant had a medically disqualifying condition that required a medical evaluation board (MEB) which was pending medical channels. The MEB documentation was not part of the separation packet. In accordance with AR 635-200, paragraph 1-33b(1), the Soldier's General Court Martial Convening Authority (GCMCA) must review the Soldier's case to determine whether the Soldier's medical condition is a contributing cause of the problem conduct (or that other circumstances of the case do not warrant disability processing instead of administrative separation).

i. On 8 June 2018, the GCMCA approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c for commission of a serious offense. He would be issued a general, under honorable conditions characterization of service.

j. On 28 June 2018, he was discharged from active duty with a general, under honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years and 6 days of active service. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct (Serious Offense)" with reentry code 3. It also shows he was awarded or authorized:

- National Defense Service Medal
- Army Service Ribbon
- Parachutist Badge
- Parachute Rigger Badge

5. On 15 August 2022, the applicant was notified the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

6. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

7. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such as commission of a serious offense, when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

8. 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.

9. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to honorable. He selected PTSD on his application as related to his request.

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:

- Applicant enlisted in the RA on 23 June 2015.
- On 11 October 2017, the applicant accepted nonjudicial punishment for one specification of failure to be at his appointed place of duty. His punishment included reduction to private E-2 suspended for 6 months.
- On 2 February 2018, the suspended reduction to private E-2 was vacated based on the applicant's disrespectful language towards a noncommissioned officer.
- On 19 April 2018, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense. The reasons for his proposed action were due to the applicant assaulting a bouncer and subsequently being charged with disorderly conduct on 11 February 2018.
- Law Enforcement Report dated 27 February 2018, reflects the applicant was
- charged with assault on police or other officer, assault-recklessly cause injury, resisting arrest by use of force, and disorderly conduct on 11 February 2018.
- A memorandum from Major [REDACTED], Senior Defense Counsel, dated 3 May 2018, notified the commander that the applicant had a medically disqualifying condition that required a medical evaluation board (MEB) which was pending medical channels. The MEB documentation was not part of the separation packet. In accordance with AR 635-200, paragraph 1-33b(1), the Soldier's General Court Martial Convening Authority (GCMCA) must review the Soldier's case to

determine whether the Soldier's medical condition is a contributing cause of the problem conduct (or that other circumstances of the case do not warrant disability processing instead of administrative separation).

- On 8 June 2018, the GCMCA approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c for commission of a serious offense. He would be issued a general, under honorable conditions characterization of service.
- On 28 June 2018, he was discharged from active duty with a general, under honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years and 6 days of active service. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct (Serious Offense)," with reentry code 3.
- On 15 August 2022, the applicant was notified the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

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), DD 214, letter dated 27 July 2020, education documentation, 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. Active-duty electronic medical records available for review indicate the applicant self-referred on 13 March 2017 to behavioral health services due to anger and irritability. The applicant participated in an in-depth intake and was provided with individual psychotherapy and group therapy. The diagnostic impression was: 1. Irritability and anger 2. Other physical and mental strain related to work 3. Insomnia, unspecified. He received ongoing behavioral health support and was also treated with psychotropic medication. A Medical Evaluation Board psychiatric screening, dated 5 February 2018, indicates the applicant met retention standards for mental health and noted no objective evidence (extensive profiling, duty limitations, Commander's performance statements etc.) that his condition significantly impacted his ability to function in his MOS in a worldwide environment while in the Army. A Mental Status Evaluation dated, 21 March 2018, for administrative separation under Chapter 14-12b for patterns of misconduct without signs of improvement, indicates he was negative for PTSD, TBI, substance misuse, and military sexual trauma. The applicant's minor depressive and anxiety symptoms were secondary to occupational concerns, and his mood symptoms did not reach the clinical threshold for a major psychiatric condition, at that time. It further notes, the applicant could understand and participate in

administrative proceedings and appreciated the difference between right and wrong. A Medical Evaluation Board Proceedings, dated 16 April 2018, reflects the applicant was referred to a Physical Evaluation Board (PEB). The applicant's chronic lumbar strain failed retention standards. However, his other conditions, to include unspecified anxiety disorder and insomnia, met retention standards.

e. The VA electronic record indicates the applicant is 100% service connected including 50% for Anxiety Disorder. A letter from his treatment provider, Dr. Rafael Lopez-Torres, dated 27 July 2020 states he is treated for anxiety and depression. A C and P examination, dated 20 March 2018, diagnosed the applicant with Unspecified Anxiety Disorder and notes his symptoms of anxiety, depression and insomnia are related to his primary diagnosis of Unspecified Anxiety Disorder and do not represent independent conditions. While the applicant self-asserted PTSD, the record does not indicate a diagnosis of PTSD. However, the applicant does have a behavioral health condition and has been receiving treatment since his time in service for anxiety.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is evidence the applicant had a behavioral health condition during military service. However, his BH condition would not mitigate his discharge.

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 asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant's active-duty record indicates that he was treated for Anxiety Disorder while in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant is 50% service connected for Anxiety Disorder and was treated for the condition while in military service and continues to receive treatment via his current treatment provider. The applicant's assertion of PTSD was considered, though not supported by a diagnosis or medical documentation. The applicant's diagnosis of Anxiety Disorder does not mitigate his assaulting a bouncer, since assault is not a progression or sequela of anxiety. In addition, Anxiety Disorder does not impact the ability to distinguish right from wrong and act in accordance with the right.

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 PTSD claim and the review and conclusions of the ARBA BH Advisor. The Board found the evidence of post-service achievements provided by the applicant insufficient to support clemency. The Board further 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.

5/6/2024

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. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. AR 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor. 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 member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed. Paragraph 14-12c further states commission of a serious offense includes abuse of illegal drugs or alcohol.

4. 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.

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, 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.

6. 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.

7. 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.

//NOTHING FOLLOWS//