

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 November 2023

DOCKET NUMBER: AR20230005447

APPLICANT REQUESTS:

- an upgrade of his characterization of service
- a personal appearance hearing before the Board via video or telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement, undated
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Letter of Good Standing from Georgia State Bar, 4 September 2014
- Certificate of Good Standing from Maryland State Bar, 11 September 2014
- Certificate of Good Standing from Washington, D.C. Bar, 30 September 2014

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:

a. He enlisted in the U.S. Army after completing his bachelor's degree in Political Science. After completing Basic Training, he moved on to Advanced Individual Training, where his career choice took a different path, and he was discharged from the military. Upon discharge, he received treatment for depression.

b. Since his discharge and his mental health issue resolved, he accomplished the following:

(1) Worked as a substitute teacher with Baltimore City Public School and a juvenile counselor with the State of Maryland Department of Juvenile Services from 1997 to 1998.

(2) Attended and graduated from the University of Baltimore with a law degree from 1998 to 2001.

(3) Took and passed the Maryland State Bar exam and participated in a six-month work abroad exchange program in the United Kingdom through the BUNAC (British Universities North America Club) in 2002.

(4) Opened his law practice in Baltimore City, practicing criminal, bankruptcy, and civil litigation and handling cases before Federal Magistrates on Andrew Air Force Base and Aberdeen Proving Grounds from 2002 to 2003.

(5) Took and passed the Georgia State Bar exam in 2004.

(6) Worked in the Baltimore County Public Defender's Office, representing criminals in hundreds of cases ranging from first-degree felony murder to minor traffic offenses from 2005 to 2007.

c. He has learned a lot of lessons from his time in the military that have helped him to succeed, and he carries these lessons with him today. However, his discharge characterization has precluded him from gaining employment and pursuing other opportunities over the past 25 years. He believes he can be of better service to his family and community if the board removes the stigma of his characterization of discharge.

3. The applicant enlisted in the Regular Army on 4 June 1997. The highest rank/grade he held was specialist (SP4)/E-4.

4. The record contains a series of documents addressing the applicant's military occupational specialty (MOS) course failure, absence without leave (AWOL), disrespect toward a noncommissioned officer and his command's intent to separate him:

a. A DA Form 4856 (General Counseling Form), dated 9 October 1997, shows he failed his MOS course twice because of problems concentrating on his course studies due to what he believed were threats of violence against his family at home. It was recommended he be dropped from the course and not be considered for another MOS.

b. Two DA Forms 4187 (Personnel Actions) show, effective 3 November 1997, the applicant's unit reported him AWOL and on 10 November 1997, he was reported as present for duty.

c. Two DA Forms 4856, dated 14 November 1997, show he was counseled for his 3 November 1997 AWOL and for being disrespectful toward and not following orders of a noncommissioned officer.

d. His commander counseled him on 17 November 1997, of his intentions to separate him from the military under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 14 (Separation for Misconduct) due to his pattern of misconduct. The commander stated: The applicant had demonstrated a character not compatible with satisfactory continued service and is against what the Army expects from its Soldiers.

5. He underwent a complete medical examination and mental status evaluation on 18 November 1997 and 4 December 1997.

a. His Standard Form 93 (Report of Medical History) shows he was seen by Community Mental Health for depression.

b. His DA Form 3822-R (Report of Mental Status Evaluation) shows he was diagnosed with antisocial personality traits. His mental status evaluation notes the applicant had a significant history of antisocial behavior, and the command could reasonably expect his future performance to resemble his past performance. He was psychiatrically cleared for any administrative action deemed appropriate by his command.

6. On 5 December 1997, he accepted non-judicial punishment under Article 15, of the Uniform Code of Military Justice, for on or about 3 November 1997, absenting himself from his unit and did remain so absent until on or about 10 November 2023. On or about 14 November 1997, having knowledge of a lawful order fail to obey the same. His punishment was reduction to Private/E-2 (PV2); forfeiture of \$500.00 pay per for two months, and extra duty and restriction for 30 days.

7. On 9 December 1997, 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 14-12b, for a pattern of misconduct. The commander noted the reason(s) for his action was the applicant's:

- 3 to 10 November 1997, AWOL
- failure to pass his MOS course
- 14 November 1997, failure to obey a lawful order
- failure to follow military rules and regulations

a. He acknowledged receipt of his commander's notification of separation.

b. He was advised by his consulting counsel of the basis for the contemplated action to separate him for a pattern of misconduct under AR 635-200, Chapter 14, paragraph 14-12b and its effects; of the rights available to him; and the effect of any action taken by him in waiving his rights. He understood that because he would have

less than six years active and/or reserve military service at the time of his separation, he would not be entitled to have his case considered by an administrative separation board unless he was being considered for a discharge under other than honorable conditions.

(1) He understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him and that he may be ineligible for some benefits as a veteran under both Federal and State laws.

(2) He understood that if he received a discharge/character of service that was less than honorable, he may make application to the Army Discharge Review Board (ADRB) or the ABCMR for upgrading; however, he realized that an act of consideration by either board does not imply that his discharge would be upgraded.

(3) He elected not to submit a statement on his own behalf.

8. On 15 December 1997, the applicant's immediate and intermediate commanders recommended his separation from the service, under the provisions of AR 635-200, paragraph 14-12b, and recommended the issuance of a general discharge.

9. On the same day, the separation authority approved the chain of command's recommendation and directed the applicant be discharged with a under honorable conditions (general) character of service.

10. On 18 December 1997, the applicant was discharged under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct, with separation code "JKA" and reentry code "3." His DD Form 214 shows he completed 6 months and 8 days of net active service; no personal awards were listed.

11. The applicant provides a letter summarizing his military time, academic and career accomplishments, and two certificates of good standing from the Georgia State Bar, Maryland State Bar, and Washington, D.C. Bar.

12. There is no indication the applicant petitioned the ADRB for an upgrade of his discharge within that Boards 15-year Statute of limitations.

13. Regulatory guidance in effect at the time provided a discharge under other than honorable conditions was normally considered appropriate for Soldier's discharged under the provisions of AR 635-200, Chapter 14. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

14. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization of service. He contends other mental health condition mitigates his discharge.

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 4 June 1997.
- DA Form 4856 (General Counseling Form), dated 9 October 1997, shows he failed his MOS course twice.
- Two DA Forms 4187 (Personnel Actions) show, effective 3 November 1997, the applicant's unit reported him AWOL and on 10 November 1997, he was reported as present for duty.
- Two DA Forms 4856, dated 14 November 1997, show he was counseled for his 3 November 1997 AWOL and for being disrespectful toward and not following orders of a noncommissioned officer.
- On 5 December 1997, he accepted non-judicial punishment under Article 15, of the Uniform Code of Military Justice, for on or about 3 November 1997, absenting himself from his unit and did remain so absent until on or about 10 November 2023.
- On 9 December 1997, 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 14-12b, for a pattern of misconduct. The commander noted the reason(s) for his action was the applicant's:
 - 3 to 10 November 1997, AWOL
 - failure to pass his MOS course
 - 14 November 1997, failure to obey a lawful order
 - failure to follow military rules and regulations
- On 18 December 1997, the applicant was discharged under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct, with separation code "JKA" and reentry code "3." His DD Form 214 shows his characterization of service was under honorable conditions (general).

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. 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. The applicant states he

enlisted in the U.S. Army after completing his bachelor's degree in Political Science. After completing Basic Training, he moved on to Advanced Individual Training, where his career choice took a different path, and he was discharged from the military. Upon discharge, he received treatment for depression. He has learned a lot of lessons from his time in the military that have helped him to succeed, and he carries these lessons with him today. However, his discharge characterization has precluded him from gaining employment and pursuing other opportunities over the past 25 years. He believes he can be of better service to his family and community if the board removes the stigma of his characterization of discharge.

d. Due to the period of service, no active-duty electronic medical records were available for review. The applicant submitted no hard copy medical documentation from his time of service evidencing a behavioral health condition. He underwent a Mental Status Evaluation on 4 December 1997. The report indicates he was diagnosed with antisocial personality traits and notes command could reasonably expect his future performance to resemble his past performance. The report indicated he met retention standards and there was no psychiatric disease or defect that warranted disposition through medical channels. The applicant was described as mentally responsible and able to distinguish right from wrong and adhere to the right. He was psychiatrically cleared for any administrative action deemed appropriate by his command.

e. No VA electronic medical records were available for review and the applicant is not service-connected. The applicant did not submit any medical documentation post-military service substantiating his assertion of depression.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. However, per Liberal Consideration guidelines, applicant's self-assertion of depression merits consideration by the board.

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 self-asserts other mental health condition mitigates his discharge

(2) Did the condition exist or experience occur during military service? Yes. The applicant reports experiencing depression during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH conditions. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for

any BH condition. And while the applicant self-asserted depression, the applicant did not provide any medical documentation substantiating the diagnosis.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance before the Board is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. The Board agreed that though no fault of his own, the applicant was not able to complete IADT and not awarded an MOS. The Board further agreed that he had completed the required minimum of 180 days. The Board further noted that the applicant is in good standing as an attorney in two states and the District of Columbia and as such is entitled to practice before a court. Notwithstanding documentation in his record reflecting a diagnosis of having antisocial personality traits which disallowed further service in the military, the Board agreed that based on the applicant's post-service accomplishments he has overcome the circumstances that led to his misconduct and recommendation for relief is warranted.

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 is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD214 for the period ending 18 December 1997 showing:

- item 24 (Character of Service): Honorable
- item 25 (Separation Authority) AR 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): no change
- item 28 (Narrative Reason for Separation): Secretarial Authority



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, U.S. Code, Section 1556, 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.

3. Army Regulation 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.

4. 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. 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.

(1) Soldiers are subject to separation under the provisions of this chapter under, paragraph 14-12b for a pattern of misconduct consisting of:

(a) Discreditable involvement with civil or military authorities.

(b) 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.

(2) A discharge under other than honorable conditions were normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.

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 Discharge Review Boards (DRB) and 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.

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.

//NOTHING FOLLOWS//