

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 December 2023

DOCKET NUMBER: AR20230005927

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) characterization of service and a personal 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 (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, in effect, he is having a hard time seeking fulfilling employment with benefits to support his family. He is often required to work hard labor jobs to make ends meet. His discharge was due to mental health. He does not believe he should be denied employment for this reason. The nature of his discharge suggests his mental health inhibits his ability to perform at work. This is not accurate. He is just as dedicated and hardworking as everyone else.
3. The applicant enlisted in the Regular Army on 13 July 2015 for a 3-year period. The highest rank he attained was private first class/E-3.
4. The applicant was formally counseled on nine occasions between 29 April 2016 and 25 January 2017. Areas of emphasis covered in the counseling include:
 - failure to obey an order or regulation
 - making false maintenance reports
 - failure to report on multiple occasions
 - lost weapon
 - missing a scheduled appointment

5. The applicant underwent a pre-separation medical examination on 23 February 2017. A DD Form 2808 (Report of Medical Examination) and corresponding DD Form 2807-1 (Report of Medical History), show the applicant reported being in good health with a history of anxiety, depression, insomnia, and sleep paralysis. He was found medically qualified for separation.
6. The applicant was formally counseled on three occasions between 3 March and 17 March 2017. Areas of emphasis covered in the counseling include failure to report and failure to maintain appearance standards.
7. A Report to Suspend Favorable Personnel Actions (FLAG) was initiated by the applicant's commander on 20 March 2017 by reason of adverse action.
8. The applicant underwent a mental health evaluation on 4 April 2017. He was diagnosed with adjustment disorder with depressed mood. The evaluating provider determined the applicant's condition was of sufficient severity to interfere with his ability to function in the military but did not meet the criteria for a medical evaluation board. He was deemed mentally responsible and cleared for administrative separation.
9. The applicant's commander initiated a FLAG on 5 April 2017 by reason of involuntary separation.
10. The applicant was notified on 17 April 2017 of his commander's intent to initiate separation action against him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 5-17, based on other mental conditions. The reason for the proposed action was the applicant's diagnosis of adjustment disorder with depressed mood. His conduct included blatant disrespect for military conduct, good order, and discipline. He received nonjudicial punishment for failure to report and was pending nonjudicial punishment for larceny of government property.
11. On that same date, the applicant acknowledged his understanding of the basis of the contemplated separation action under the provisions of Army Regulation 635-200, paragraph 5-17, by reason of other mental conditions. He accepted the opportunity to consult with appointed counsel and elected not to provide a statement in his own behalf.
12. The applicant's immediate and intermediate commanders formally recommended the applicant's separation from service under the provisions of Army Regulation 635-200, Chapter 5. The intermediate commander further recommended an under honorable conditions (general) characterization of service.

13. On 18 April 2017, the separation authority approved the recommended discharge, waived the rehabilitative transfer requirements, and directed an under honorable conditions (general) characterization of service.

14. The applicant was discharged on 3 May 2017 under the provisions of Army Regulation 635-200, paragraph 5-17, by reason of condition, not a disability. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was under honorable conditions (general), with separation code JFV and reentry code 3. He was credited with 1 year, 9 months, and 21 days of net active service.

15. Regulatory guidance states, commanders who are special court-martial convening authorities may approve separation under this paragraph based on other physical or mental conditions not amounting to disability that potentially interfere with assignment to or performance of duty.

16. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

17. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization. The applicant contends that other mental health is a mitigating factor in 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 13 July 2015.
- The applicant was formally counseled on nine occasions between 29 April 2016 and 25 January 2017. Areas of emphasis covered in the counseling included: failure to obey an order or regulation, making false maintenance reports, failure to report on multiple occasions, lost weapon and missing a scheduled appointment.
- The applicant was formally counseled on three occasions between 3 March and 17 March 2017. Areas of emphasis covered in the counseling include failure to report and failure to maintain appearance standards.
- A Report to Suspend Favorable Personnel Actions (FLAG) was initiated by the applicant's commander on 20 March 2017 by reason of adverse action.
- The applicant's commander initiated a FLAG on 5 April 2017 by reason of involuntary separation.

- The applicant was notified on 17 April 2017 of his commander's intent to initiate separation under AR 635-200, paragraph 5-17, based on other mental conditions. The reason for the proposed action was the applicant's diagnosis of adjustment disorder with depressed mood. His conduct included blatant disrespect for military conduct, good order, and discipline. He received nonjudicial punishment for failure to report and was pending nonjudicial punishment for larceny of government property.
- The applicant was discharged on 3 May 2017 under AR 635-200, paragraph 5-17, by reason of condition, not a disability with an under honorable conditions (general) characterization of service.

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, his ABCMR Record of Proceedings (ROP), his DD Form 214, 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.

d. The applicant asserts other mental health as a mitigating factor in his discharge. More specifically, he reported that mental health is why he was discharged (5-17) and he does not feel this should continue to impact his employment, as he reports difficulty finding full-time employment. He believes that "the nature of his discharge suggests his mental health inhibits his ability to perform at work. This is not accurate. He is just as dedicated and hardworking as everyone else."

e. The applicant's electronic health records (EHRs) from his time in service show that the applicant first engaged in mental health care on 28 July 2016 and remained engaged in care until shortly before his separation. He engaged regularly with mental health care, to include individual and group therapy, substance use disorder clinical care (SUDCC) to address THC use, as well as medication management. He has been diagnosed with other recurrent depressive disorders (30 September 2016) and adjustment disorder with depressed mood (10 April 2017).

f. His supporting documents and service records also contained relevant medical information. He completed his separation medical examination on 23 February 2017. In his Report of Medical History, he indicated he was in good health but does have a history of sleep paralysis (occurs 2-3x a month), nervous troubles (anxiety or panic attacks), receiving counseling (stated he was currently enrolled in BH), depression or excessive worry, and attempted suicide ("cutting wrist" and it occurred prior to military service). His Report of Medical Examination noted his psychiatric clinical evaluation as normal, though did make note of the history reported above. The applicant was seen for

a chapter 5-17 separation mental status exam (MSE) on 4 April 2017. The applicant's presentation was unremarkable. The applicant was found to have the mental capacity to understand and participate in the proceedings and was able to distinguish right from wrong. He was diagnosed with adjustment disorder with depressed mood. The evaluating provider determined the applicant's condition was of sufficient severity to interfere with his ability to function in the military but did not meet the criteria for a medical evaluation board. The provider also reviewed the fact that he had previously been diagnosed with a potentially boardable condition (Depressive Disorder) in 2016 but the change in diagnosis was sufficiently justified in the clinical write up. The evaluation also reflects that there was no evidence that the applicant met criteria for any condition requiring a referral to IDES. He was cleared for administrative separation and was recommended for a Chapter 5-17 given his condition had been found to significantly impact his duty performance.

g. Per the applicant's VA EHR, he is not service connected. He has not been engaged in any mental health care through the VA and he holds no mental health diagnoses with the VA. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health encounters. No other medical records were provided.

h. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a mental health condition during his time in service. That said, only a portion of his misconduct would be mitigated.

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 other mental health as a mitigating factor.

(2) Did the condition exist or experience occur during military service? Yes, there is evidence the applicant was diagnosed with a mental health disorder while in the service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. The applicant was diagnosed with depressive disorder and an adjustment disorder with depressed mood while in the service, with each diagnosis being present in his record spanning his negative counseling statements and misconduct. However, an adjustment disorder alone is not typically a mitigating condition, though his previously diagnosed depressive disorder would be. Avoidance behaviors as well as difficulty with sleep and motivation can, can manifest as failure to reports, which is consistent with

natural history and sequelae of depression. There is a nexus between depression and a portion of the misconduct cited in his separation counseling. However, there is no nexus between larceny of government property. That said, his record is unclear if these charges were ever filed and/or contributed to his general discharge. He also received numerous negative counseling statements for behaviors that ultimately did not appear to be the reason for non-judicial punishment but did likely contribute to his recommendation for separation. Some but not all of these behaviors would be mitigated. Again, failure to reports, missing appointments and not keeping up with grooming standards are all consistent with depression. However, failure to obey orders, false maintenance reports, and a lost weapon are not consistent with depression. Hence, this advisor supports at minimum, a partial upgrade.

BOARD DISCUSSION:

After reviewing the application, supporting documents, evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, applicable regulatory guidance and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the misconduct, court-martial charges and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, and, in the absence of post-service achievements or letters of reference to weigh in support of a clemency determination, 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 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. Section 1556 of Title 10, USC, 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) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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. Paragraph 5-17, states commanders who are special court-martial convening authorities may approve separation under this paragraph based on other physical or mental conditions not amounting to disability that potentially interfere with assignment to or performance of duty. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition. Members may be separated for physical or mental conditions not amounting to disability, which is sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

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; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran

a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

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, 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//