

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 January 2024

DOCKET NUMBER: AR20230006438

APPLICANT REQUESTS: correction of the narrative reason for his 1996 Regular Army separation from “misconduct” to disability retirement.”

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- February 2016 Department of Veterans Affairs (VA) Rating Decision
- U.S. Courts of Appeals for Veteran Claims

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 wants his discharge from the U.S. Army be changed from misconduct to a medical retirement. At the time of his discharge, his discharge examination reflected a diagnosis of anxiety, depression, and subsequently post-traumatic stress disorder (PTSD). His Gulf War exams from 1995 noted the diagnosis of depression with adjustment disorder and symptoms of PTSD.
3. Review of the applicant’s available service records shows:
 - a. He enlisted in the Regular Army on 1 August 1989 and held military occupational specialty 71L, Administrative Specialist.
 - b. He served in Southwest Asia from 25 January to 5 May 1991. He was promoted to SPC, E-4 on 1 March 1992 and he reenlisted on 20 September 1993.
 - c. On 22 February 1996, the applicant submitted a routine urinalysis sample which was subsequently tested positive for marijuana.

d. On 12 March 1996, the applicant was given a direct order to have no contact with a female Specialist. On 14 March 1996, the female Specialist filed a written complaint against the applicant for sexual harassment.

e. On 14 March 1996, the applicant requested to talk with his commander. He was read his rights and he elected to answer questions without an attorney present. He admitted to his commander and two witnesses, to smoking marijuana when he was on leave at the end of January/beginning of February 1996. He denied sexually harassing anyone.

f. On 15 March 1996, he accepted nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice, for wrongfully using marijuana. His punishment included reduction to private/E-2.

g. On 19 March 1996, the applicant underwent a mental status evaluation. The provider found him mentally responsible with the mental capability to understand and participate in proceedings. He was psychiatrically cleared for any action deemed appropriate by his command.

h. On 21 March 1996, the applicant was counseled for perpetrating a fraud against the Government on 22 February 1996 by informing the local finance office that he did not receive a \$1,000.00 check sent to him on 3 February 1996 and that he did not endorse such a check. He signed an official document to that effect. He was also counseled at this time for making unauthorized personal calls on a military phone.

i. On 26 March 1996, the Post Equal Opportunity (AO) Advisor conducted an inquiry into complaints against the applicant and found a pattern of misconduct that disturbed the good order and discipline of the female Soldiers, who came in contact with the applicant. The EO advisor opined that the applicant's behavior demonstrated that he could be charged with cruelty and maltreatment, extortion, assault, and communicating a threat and recommended that the applicant be separated without delay.

j. On 28 March 1996, the unit commander signed a memorandum where he indicated that the applicant had been command referred and enrolled in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for alcohol addiction. He successfully completed the program as "fair" on 21 December 1993. He was again command referred and enrolled in ADAPCP for alcohol addiction on 28 May 1994. He successfully completed the program on 27 October 1994 as "good." He was not enrolled in ADAPCP at the time he tested positive for marijuana, so he was again command referred, this time for marijuana use. ADAPCP did reveal that the applicant did not follow up on his responsibilities to attend outpatient therapy at his last unit. A chapter 9 separation, for drug/alcohol rehabilitation failure, was not appropriate since he was not then currently enrolled in ADAPCP.

k. On 1 April 1996, the unit commander notified the applicant of his intent to initiate separation action against him under the provisions of Chapter 14, Army Regulation (AR) 635-200 (Personnel Separations) by reason of misconduct-commission of a serious offense, with an under other than honorable conditions discharge. The applicant's unit commander indicated that the specific reasons for his action to separate the applicant were: the applicant's use of illegal drugs (marijuana); attempted fraud; disobeying a commissioned officer; making a false official statement; communicating threats; solicitation of prostitution; and indecent language by making sexual comments.

l. The applicant was advised of his rights. He consulted with legal counsel, was advised of the impact of the discharge action, voluntarily waived consideration of his case by an administrative separation board contingent upon him receiving a characterization of service no less favorable than a general, under honorable conditions discharge and did not submit a statement in his own behalf.

m. The unit commander subsequently recommended separation from the service, and waiver of further rehabilitative efforts. The applicant's company, battalion, and brigade commanders reviewed the entire chapter packet to include the additional interview with the applicant, dated 14 March 1996, and all recommended he receive a discharge under other than honorable conditions.

n. On 13 May 1996, the applicant again consulted with legal counsel and waived consideration of his case by an administrative separation board.

o. On 31 May 1996, the separation authority waived further rehabilitative efforts and directed that the applicant be discharged with an under other than honorable conditions discharge.

p. On 5 June 1996, the applicant was discharged from active duty. His DD Form 214 shows he was discharged under the provisions of chapter 14-12c of AR 635-200 with an under other than honorable conditions characterization of service (Separation Code JKQ, Reentry Code 3). At the time of discharge, he had completed 2 years, 8 months, and 16 days, service on his current period of enlistment under review and 6 years, 10 months and 5 days, total time in service.

4. On 19 January 2001, the Army Discharge Review Board denied his request for an upgrade of his discharge. The ADRB determined:

a. The applicant's discharge was appropriate because the quality of service was not consistent with the Army's standards for acceptable personal conduct and performance of duty by military personnel. By his serious misconduct and poor duty performance, the applicant diminished the quality of service below that meriting a fully honorable or general discharge. The applicant provided no independent corroborating evidence

demonstrating that either the command's action was erroneous or that the applicant's service mitigated the misconduct or poor duty performance.

b. The ADRB, being convinced that the reason for discharge and the characterization of service were both proper and equitable, voted to deny relief.

5. On 13 March 2001 the ABCMR considered and denied his request to upgrade his discharge and restore his rank. The Board stated:

a. The applicant's administrative separation was accomplished in compliance with applicable regulations with no indication of procedural errors which would tend to jeopardize his rights.

b. There is no evidence to show that the applicant was in the physical disability processing system at any time. The only profile available is a temporary profile. Even the unsigned and undated memorandum from his former commander certifying he had graduated from Phase III effective 19 October 1995 made no mention of his being assigned to Fort Knox, KY for medical separation. Even if he had been in the physical disability processing system, once action was started to separate him under AR 635-200, chapter 14, which authorized a characterization of service of under other than honorable conditions, it would have been appropriate to stop that processing.

c. The Board acknowledges that the applicant's misconduct that resulted in his discharge occurred during his last assignment during a relatively short period of time. However, considering the type of misconduct for which he was cited, the characterization of his discharge as UOTHC was appropriate. The Board also acknowledges that he had completed his first term of service honorably. However, he abused alcohol and drugs throughout the period from his reenlistment on 20 September 1993 to January 1996, when his misconduct at Fort Knox started. The Board concludes that such behavior does not warrant upgrading of his discharge.

d. The applicant was a Specialist with 6 years in service and a prior history of substance abuse. The Board concludes that the punishment given under the Article 15 for marijuana use, a reduction to Private, E-2, was appropriate given the circumstances. His reduction to Private, E-1 due to the characterization of his discharge was appropriate. In view of the foregoing, there is no basis for granting the applicant's request.

6. By regulation (AR 635-200), Soldiers are subject to separation under the provisions of paragraph 14-12c for misconduct, serious offense, or 14-12c for misconduct – serious offense. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter.

7. 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.

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a medical retirement discharge instead of his administrative discharge for misconduct. He contends that he experienced mental health conditions including PTSD, which mitigates his misconduct and warrants a medical discharge.

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: 1) The applicant enlisted in the Regular Army on 1 August 1989; 2) He served in Southwest Asia for five months as an Administrative Specialist from 25 January to 5 May 1991; 3) On 22 February 1996, the applicant tested positive for marijuana. On 15 March 1996, he accepted nonjudicial punishment for wrongfully using marijuana; 4) On 12 March 1996, the applicant was given a direct order to have no contact with a female Specialist. On 14 March 1996, the female Specialist filed a written complaint against the applicant for sexual harassment; 5) On 21 March 1996, the applicant was counseled for perpetrating a fraud against the Government on 22 February 1996 by informing the local finance office that he did not receive a \$1,000.00 check sent to him on 3 February 1996 and that he did not endorse such a check. He signed an official document to that effect. He was also counseled at this time for making unauthorized personal calls on a military phone; 6) On 26 March 1996, the Post Equal Opportunity (AO) Advisor conducted an inquiry into complaints against the applicant and found a pattern of misconduct that disturbed the good order and discipline of the female Soldiers, who came in contact with the applicant. The EO advisor opined that the applicant's behavior demonstrated that he could be charged with cruelty and maltreatment, extortion, assault, and communicating a threat and recommended that the applicant be separated without delay; 7) On 1 April 1996, the unit commander notified the applicant of his intent to initiate separation action against him under the provisions of Chapter 14, Army Regulation (AR) 635-200 (Personnel Separations) by reason of misconduct-commission of a serious offense, with an under other than honorable conditions discharge. The applicant's unit commander indicated that the specific reasons for his action to separate the applicant were: the applicant's use of illegal drugs (marijuana); attempted fraud; disobeying a commissioned officer; making a false official statement; communicating threats; solicitation of prostitution; and indecent language by making sexual comments; 8) On 5 June 1996, the applicant was discharged from active duty, Chapter 14-12c-under other than honorable conditions characterization of service; 9) The ADRB denied the applicant's request for an upgrade in January 2001, and the ABCMR denied his request for an upgrade in March 2001.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and the applicant's VA Benefits letters and documents submitted to the VA were also examined.

d. The applicant states he incurred mental health conditions including PTSD while on active service, which mitigates his misconduct and should have resulted in a medical disability discharge. There is sufficient evidence the applicant was deployed to an active combat area. The applicant was seen on 19 March 1996 for a mental status evaluation. The provider found him mentally responsible with the mental capability to understand and participate in proceedings. He was psychiatrically cleared for any action deemed appropriate by his command. On 28 March 1996, the unit commander signed a memorandum where he indicated that the applicant had been command referred and enrolled in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for alcohol addiction. He successfully completed the program as "fair" on 21 December 1993. He was again command referred and enrolled in ADAPCP for alcohol addiction on 28 May 1994. He successfully completed the program on 27 October 1994 as "good." He was not enrolled in ADAPCP at the time he tested positive for marijuana, so he was again command referred, this time for marijuana use. ADAPCP did reveal that the applicant did not follow up on his responsibilities to attend outpatient therapy at his last unit. A chapter 9 separation, for drug/alcohol rehabilitation failure, was not appropriate since he was not then currently enrolled in ADAPCP.

e. A review of JLV provided evidence the applicant began to engage in care at the VA in 1999. The applicant has completed a Compensation and Pension (C&P) Evaluation for Mental Disorders in 1996, 2012, 2015, 2016, and 2018. Presently, the applicant has been found to be 100% service connect for neurosis. The applicant has been diagnosed with a personality disorder (features of antisocial and narcissistic personality disorders) by the VA, and he has reported difficulty with anxiety, depression, insomnia, substance abuse, and symptoms of a head injury since his discharge.

f. Based on the available information, it is the opinion of the Agency BH Advisor that he was evaluated by a licensed behavioral health provider while on active service and was found to meet the retention standards. The applicant also repeatedly engaged in substance abuse treatment while on active service, and he was not recommended for a medical discharge. Therefore, there is insufficient evidence at this time that the applicant warrants a referral to IDES from a behavioral health perspective. Lastly, there is insufficient evidence the majority of the applicant's misconduct is mitigatable by a mental health condition or experience.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he experienced mental health conditions

including PTSD while on active service. The applicant has been diagnosed with service-connected neurosis.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he experienced mental health conditions including PTSD while on active service. The applicant has been diagnosed with service-connected neurosis.

(3) Does the condition experience actually excuse or mitigate the discharge? No, the applicant was evaluated by a licensed behavioral health provider while on active service and was found to meet the retention standards. The applicant also repeatedly engaged in substance abuse treatment, and he was not recommended for a medical discharge. Therefore, there is insufficient evidence at this time that the applicant warrants a referral to IDES from a behavioral health perspective. The applicant did engage in substance abuse and avoidant self-medicating behavior can be a natural sequelae to anxiety, depression, and PTSD. However, there is no nexus between the applicant's misconduct of attempted fraud, making a false official statement, communicating threats, solicitation of prostitution, and indecent language given that: 1) these types of misconduct are not part of the natural history or sequelae of his reported mental health conditions; 2) his reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends a mental health condition resulted in his misconduct, and per the Liberal Consideration Policy, his contention is sufficient for 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 contentions, the military record, and applicable regulatory guidance. The Board considered the severity and frequency of the misconduct which led to his discharge and his reasoning for requesting a medical retirement. Prior to discharge, the applicant was afforded a mental status evaluation and was determined to be mentally responsible and mentally capable to understand and participate in proceedings. Further, he was psychiatrically cleared for any action deemed appropriate by his command. Although the applicant has a post-service diagnosis of PTSD and service connected neurosis, neither affect his ability to distinguish right from wrong and act in accordance with the right. After due consideration of the applicant's request, the Board determined the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for relief is not warranted.

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

After due consideration of the applicant's request, the Board determined the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for a correction of the narrative reason for separation to show disability retirement is not warranted.

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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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's service records shows his DD Form 214 omitted administrative entries. As a result, amend his DD Form 214 to show the following awards:

- Member Completed First Full Term of Service
- Continuous Honorable Service from 1 August 1989 to 19 September 1993

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 635-200 (Personnel Separations), in effect then sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is given when the quality of the Soldier's service has generally met standards of acceptable conduct and duty performance.

b. 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. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or absence without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. Army policy states that an under other than honorable conditions discharge is normally considered appropriate for a Soldier discharged for misconduct.

3. Title 38, U.S. Code 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

4. Title 38 U.S. Code 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation

as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. 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.

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. 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. 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//