

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 January 2024

DOCKET NUMBER: AR20230007257

APPLICANT REQUESTS: His under honorable conditions (general) discharge be upgraded to an honorable and his rank of E-5 be restored.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Rating Decision

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 a prior honorable discharge and had not previously requested an upgrade, because he felt he did not deserve it and that he had failed although it was the system that failed him. On the applicant's request, he indicates other mental health issues as contributing and mitigating factors in the circumstances that resulted in his separation.
3. The applicant enlisted in the Regular Army on 30 July 1993 for 6 years. He completed training and was awarded the military occupational specialty 11B (Infantryman). He reenlisted on 6 November 1996 and the highest rank he attained was E-5.
4. Between 8 June 1998 and 10 August 1998, the applicant was formally counseled on 5 occasions for various infractions including, but not limited to being absent without leave (AWOL), missing formations, and missing movement.
5. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice on 22 July 1998 for being AWOL from at or about 0900 hours on 3 June 1998 until at or about 0900 hours, on 7 June 1998. His punishment included

reduction to E-4, forfeiture of \$689.00 per month for two months, and 45 days restriction and extra duty.

6. A DA Form 3822-R (Report of Mental Status Evaluation), dated 11 August 1998, shows the applicant had no abnormalities in behavior, level of orientation, mood, thinking process, thought content, or memory. He was determined to be mentally capable to understand and participate in the proceedings deemed appropriate by command.
7. The applicant was afforded a medical examination, on 12 August 1998, wherein he indicated he had been treated for depression and that he had been confined by civilian police on a domestic disturbance.
8. The applicant's immediate commander notified the applicant, on 27 August 1998, of his intent to initiate actions to separate him under Army Regulation 635-200 (Personnel Separations – Enlisted), Chapter 14, paragraph 14- 12b for misconduct – pattern of misconduct. His commander noted the specific reasons were his two periods of AWOL and periods of missing movement:
9. The applicant acknowledged the initiation action and declined counsel on 27 August 1998. He elected not to submit a statement in his own behalf.
10. The applicant's immediate commander formally recommended the applicant be separated from service on 27 August 1998.
11. The separation authority approved the discharge recommendation on 1 September 1998 and directed the applicant be issued an under honorable conditions (general) discharge.
12. The applicant was discharged on 8 October 1998 in the pay grade of E-4. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 14, for misconduct with an under honorable conditions (general) character of service, a Separation Code of JKA and a Reentry Code of 3. He was credited with 5 years, 2 months, and 3 days of net active service. He is shown to have had 6 days of lost time.
13. The applicant enlisted in the Army National Guard on 14 September 2007 and was honorably discharged on 13 September 2009.
14. The applicant provided a copy of a VA Rating Decision, dated 3 February 2023 showing award of service connection for major depressive disorder, recurrent, moderate, with anxious features at a 30 percent evaluation. The effective date of the award was 13 November 2021.

#### 15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting his under honorable conditions (general) discharge be upgraded to an honorable and rank restored. He contends he experienced mental health conditions that mitigates his misconduct.

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 30 July 1993; 2) Between 8 June 1998 and 10 August 1998, the applicant was formally counseled on five occasions for various infractions including, but not limited to being absent without leave (AWOL), missing formations, and missing movement; 3) The applicant accepted nonjudicial punishment (NJP) on 22 July 1998 for being AWOL from 3-7 June 1998; 4) On 8 October 1998, the applicant was discharged, Chapter 14, for misconduct with an under honorable conditions (general) character of service; 5) The applicant enlisted in the Army National Guard on 14 September 2007 and was honorably discharged on 13 September 2009.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA) and VA's Joint Legacy Viewer (JLV) were also examined.

d. The applicant asserts he was experiencing mental health conditions as contributing and mitigating factors in the circumstances that resulted in his separation from the Regular Army. The applicant was seen for a Mental Status Exam on 11 August 1998 as part of his separation proceedings. He was not diagnosed with a mental health condition, and he was cleared to participate in the proceedings deemed appropriate by command. The applicant was also seen for a medical exam on 12 August 1998. He reported being treated for depression and had a history of being confined by civilian authorities for domestic disturbance.

e. A review of JLV provided evidence the applicant has been diagnosed and treated for service-connected depression since 2021. He receives 30% disability for this condition.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reported symptoms of depression while on active service, and he has been diagnosed with service-connected depression by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reported symptoms of depression while on active service, and he has been diagnosed with service-connected depression by the VA.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence that the applicant was experiencing of symptoms of depression while on active service. The applicant had a history of avoidant behavior such as being AWOL, missing formations, and missing movement. Avoidant behaviors are often a natural sequelae to depression. Therefore, in accordance with Liberal Consideration, the applicant was experiencing a mitigating mental health condition.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was partially warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The evidence shows the applicant exhibited a pattern of misconduct; specifically, he had been AWOL twice, and missed extra duty, and his commander viewed him as undesirable for further service. As a result, separation action was initiated against the applicant. He was discharged in the pay grade of E-4 for misconduct with an under honorable conditions (general) character of service, after completing 5 years, 2 months, and 3 days of net active service, with 6 days of lost time. The Board found no error or injustice in his separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding sufficient evidence that the applicant was experiencing of symptoms of depression while on active service. The applicant had a history of avoidant behavior such as being AWOL, missing formations, and missing movement. Avoidant behaviors are often a natural sequelae to depression. Therefore, the Board determined her service clearly did not rise to the level required for an honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board further unanimously determined no change to the reason for separation and/or associated Separation Code or RE Code is warranted as the underlying reason for separation remains the same.

c. The applicant was promoted to SGT during his active duty service. However, he received NJP under Article 15 on 22 July 1998 for being AWOL, which resulted in his reduction to SPC/E-4. There is no evidence in the record that shows he was promoted

back to SGT between the date of his reduction and the date of his discharge. His DD Form 214 correctly shows the grade he held at the time of separation and the Board found no reason to change it.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

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:            :            :            GRANT FORMAL HEARING

:            :            :            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial 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 DD Form 214 for the period ending 8 October 1998 showing:

- Character of Service: Honorable
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to the grade of SGT/E-5.

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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.

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, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

d. Paragraph 14-12b (A pattern of misconduct) states a Soldier may be discharged for pattern of misconduct consisting of one of the following:

(1) Discreditable involvement with civil or military authorities.

(2) 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.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//