

IN THE CASE OF: ██████████

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008722

APPLICANT REQUESTS:

- reconsideration of his previous request to upgrade his under honorable conditions (General) discharge to honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Medical Records (5 pages)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210005583 on 16 September 2021.
2. The applicant states he would like to be honorably discharged. He wanted to make a career of the military and was robbed of that opportunity. He served his country honorably and believes he never received justice. He further noted he never went before the legal office or State court for his misconduct. He was misled due to his lack of knowledge and believes there was a bias against him.
3. The applicant provides documents from his medical records for treatment received from approximately May 2021 to June 2023. He also indicates on his DD Form 149 that post traumatic stress disorder (PTSD) and traumatic brain injury (TBI) are issues/conditions related to his request.
4. A review of the applicant's service record shows:
  - a. He enlisted in the Regular Army on 28 December 1989.

b. The service record includes the applicant's medical evaluations for the purpose of administrative separation wherein the applicant marked he had numerous health concerns to include depression. The applicant was marked qualified for separation.

- SF 88 (Report of Medical Examination), dated 29 July 1992
- SF 93 (Report of Medical History), dated 29 July 1992

c. A DA Form 3822-R (Report of Mental Status Evaluation), dated 28 July 1992, confirmed the applicant was referred for a mental evaluation because he was being considered for discharge. The physician noted in the remarks, the applicant was psychiatrically cleared for any administrative (or judicial) action deemed appropriate by the command. The evaluation further indicated:

- normal behavior and fully alert
- fully oriented and depressed
- clear thinking process and normal thought content
- he had the mental capacity to understand and participate in the proceedings
- he was mentally responsible
- he meets the retention requirements of chapter 3, AR 40-501

d. On 4 August 1992, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c, for commission of a serious offense. The reason for his proposed action was due to the applicant being charged by civil authorities for aggravated robbery. He recommended the applicant receive a General Discharge Certificate. The applicant acknowledged receipt on the same day.

e. On 4 August 1992, 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 general discharge under honorable conditions is 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

f. 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.

g. The separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c . He would be issued a General, Under Honorable Conditions Discharge Certificate.

h. On 10 August 1992, he was discharged from active duty with an under honorable conditions (General) characterization of service. His DD Form 214 shows he completed 2 years, 7 months, and 3 days of active service with no lost time. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct-Commission of Serious Offense)," with reentry code 3. It also shows he was awarded or authorized:

- Army Service Ribbon
- National Defense Service Medal
- Overseas Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- Marksman Marksmanship Qualification Badge with Hand Grenade Bar

5. On 16 September 2021, the ABCMR rendered a decision in Docket Number AR20210005583. The Board 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 PTSD. The Board determined that the characterization of service the applicant received upon separation was not in error or unjust.

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

7. 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

8. 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.

9. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

## 10. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous request to upgrade his under honorable conditions (General) discharge to honorable. He contends PTSD and TBI 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 28 December 1989.
- On 4 August 1992, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c, for commission of a serious offense. The reason for his proposed action was due to the applicant being charged by civil authorities for aggravated robbery. He recommended the applicant receive a General Discharge Certificate. The applicant acknowledged receipt on the same day.
- On 10 August 1992, the applicant was discharged from active duty with an under honorable conditions (General) characterization of service. His DD Form 214 shows he completed 2 years, 7 months, and 3 days of active service with no lost time. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct-Commission of Serious Offense," with reentry code 3.
- On 16 September 2021, the ABCMR rendered a decision in Docket Number AR20210005583. The Board 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 PTSD. The Board determined that the characterization of service the applicant received upon separation was not in error or unjust.

c. 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), VA medical records, 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. The applicant states he would like to be honorably discharged. He wanted to make a career of the military and was robbed of that opportunity. He served his country honorably and believes he never received justice. He further noted he never went before the legal office or State court for his misconduct. He was misled due to his lack of knowledge and believes there was a bias against him.

e. Due to the period of service, no active-duty electronic medical records were available for review. The applicant submitted hard copy documentation from his time of service including a medical evaluation, dated 29 July 1992, for the purpose of administrative separation where he marked numerous health concerns. In addition to a mental status evaluation, dated 28 July 1992, indicating the applicant was psychiatrically cleared for any administrative (or judicial) action deemed appropriate by the command, was mentally responsible, and met retention standards.

f. On 16 September 2021, the ABCMR found insufficient evidence of in-service mitigating factors since the applicant's contention of combat-related PTSD and TBI due to an in-service motor vehicle accident MVA were not supported by his service record. The applicant's personnel and VA records, indicate he did not deploy to a combat zone and the 1993 motor vehicle accident (MVA), he claimed as the basis of his contention of TBI, did not occur while the applicant was in-service.

g. The VA electronic medical record indicates the applicant is 100% service connected for PTSD. The applicant sought services from the VA following his discharge from a 20-year incarceration. A mental health note, dated 27 May 2021, diagnosed the applicant with Alcohol Use Disorder, PTSD, and Insomnia, based on his self-reported traumatic history and symptoms. Per the applicant, he reported "experiencing a lot of stress after returning from the Persian Gulf War". The clinician noted inconsistencies in the applicant's report. The applicant's VA record indicates he was flagged by the VA due to disruptive behavior. He participated intermittently in mental health services. In a mental health encounter dated 27 October 2022, the applicant continues to indicate a history of in-service trauma, and he identified his index trauma as a club bombing in Nuremberg, Germany. This was not supported by factual information since a bombing in a discotheque occurred in West Berlin, Germany in 1986; before the applicant enlisted. The VA electronic record indicates he was removed from specialized treatment for PTSD since he was not engaging or benefitting from trauma-focused therapy since his trauma appeared to be based on his experience during incarceration. "Upon further exploration it was identified that he would like to work on his main threat to life while incarcerated". The applicant reinitiated mental health service on 22 September 2023, he disclosed during this intake session being involved in a motor vehicle accident in 1993 where he was found with a large amount of illegal substances, in his vehicle, and was charged with intent to distribute and sentenced to 20 years in prison.

h. 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, regardless of diagnosis, the applicant's misconduct would not be mitigated by a BH condition.

## 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 is service-connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant is service-connected for PTSD, however, his service record does not support his service connection. Regardless of service connection, PTSD would not mitigate aggravated robbery. His misconduct is not part of the natural history or sequelae of any behavioral health condition. And, even if PTSD symptoms were present at the time of his misconduct, they do not impact the ability to distinguish right from wrong and act in accordance with the right.

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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of aggravated robbery. The applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination.

2. The Board noted, the applicant was discharged for misconduct and was provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. Based on the preponderance of evidence, the Board determined reversal of the previous Board decision is without merit and denied relief.

3. The applicant's request for a personal appearance hearing 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 hearing is not necessary to serve the interest of equity and justice in this case.

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 found 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 to amend the decision of the ABCMR set forth in Docket Number AR20210005583 on 16 September 2021.

  
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 CHAIRPERSON  
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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. 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.

2. AR 635-200 (Personnel Separations – Enlisted Personnel) 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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was, or could be authorized for that same or relatively similar offense under the UCMJ. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

3. 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.



4. 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.

5. 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.

6. 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//