

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230009525

APPLICANT REQUESTS:

- reconsideration of his previous request to:
 - upgrade his under other than honorable conditions (UOTHC) discharge to honorable
 - change his narrative reason for separation from misconduct to Secretarial Authority
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Docket Number AR20200008321, dated 9 April 2021
- DD Form 214 (Certificate Of Release or Discharge from Active Duty)
- Standard Form (SF) 180 (Request Pertaining to Military Records), dated 30 June 2019
- Lawyer's statement

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 AR20200008321 dated 9 April 2021.
2. The applicant states, in effect, he is requesting liberal reconsideration of his previous case to upgrade his UOTHC discharge to an honorable discharge. In addition, the applicant requests a narrative reason of secretarial authority. He believes his discharge was unfair at the time and remains so now.
3. The applicant's counsel addresses the requested relief, procedural posture, and legal standards. He then provides a background of the applicant's military service, offenses, and reasons for discharge, and summarizes his argument as follows:

a. There is a procedural defect in this case. The request for administrative separation can be both command-initiated and initiated by the service-member. In this case, there was a hasty command-initiated request for separation. The applicant was under investigation for a pattern of misconduct, but the command did not wait to find out the results of the investigation. During a Command-initiated discharge request, under Chapter 10, Army Regulation 635-200 (Personnel Separations). Consideration should be given to the Soldier's potential for rehabilitation, and his/her entire record should be reviewed before taking action. The commander must provide the member reasonable time to overcome deficiencies. In this case there was a rush to judgment that there was a problem that could not be fixed. The command should have evaluated the applicant as to whether he had a long-term problem or *whether there was an immediate fix.

b. Although the Command was authorized to administratively separate the applicant, the fundamental reason for the discharge was substantially deficient. There was no fully determined reason to initiate his elimination. The Instruction also allows for the service-member to be able to "fix" the problem. The applicant was not allowed these opportunities. The service-member was never offered or provided with rehabilitation and the results of his investigation were never reviewed prior to his discharge. The Command in this case did not have the proper authority to administratively separate him.

c. Finally, "does not serve a further purpose. The events that took place are no longer relevant to the applicant's life and he has lived since in as responsible a manner as he could. There is no valid equitable purpose in leaving the Discharge in place.

d. Other Considerations: The entirety of the applicant's military career is reflected in his personnel records, medical records, and personal affidavit. Reviewing his military record, he gave as much as he could to the U.S. Army. Also, the Applicant has sought to fix his life since being involuntarily separated. He has received statements from supervisors and friends attesting positively to his character and work ethic since his separation from the U.S. Army. Additionally, the applicant's compelling affidavit should also be considered.

4. The applicant marked "Other Mental Health Issues" and provides:

a. Previous ABCMR Docket Number AR20200008321, dated 9 April 2021, that states after reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. Documentation available for review shows that the applicant was duly counseled, requested voluntary discharge, and acknowledge the terms and conditions of discharge up signing the document and there is no basis upon which to grant relief. However, upon further review, the Board did amend his

DD Form 214 for the period ending on 6 August 1993, to indicate he completed first full term of service and had continuous honorable active service from 800610 until 890906”

b. Standard Form 180, dated 30 June 2019, shows he requested all pertinent medical records and all military records that were available at the time.

5. The applicant’s record is incomplete. However, the applicant’s service record reflects:

a. DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of The United States) shows he enlisted in the Regular Army on 10 January 1980 for three years, followed by multiple reenlistments.

b. A DA Form 2627 (Record of Proceedings Under Article 15, UCMJ), dated 13 November 1992 shows he received nonjudicial punishment under the provisions of Article 15, UCMJ for failing to go at the prescribed time to his appointed place of duty, on or about 6 November 1992.

c. A DA Form 3822-R (Report of Mental Status Evaluation), dated 11 February 1993 shows he underwent a mental status evaluation as part of a Chapter 14 elimination. The report further shows he had the mental capacity to understand and participate in board proceedings; he was mentally responsible; he met retention requirements of Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3; and further show the following in remarks:

- The applicant was seen at Community Mental Health Services (CMHS) for Chapter 14 evaluation
- Soldier was not suicidal/homicidal during time of interview; reality testing intact; Soldier was spontaneous, speech was well modulated and enunciated; Soldier was cooperative during interview
- Soldier’s mental status evaluation was within normal limits at this time; Soldier knows right from wrong
- It appears, as evidenced by his behavior that this Soldier is prone to disrupt the cohesiveness of his unit’s functioning if allowed to remain in military service
- Soldier is cleared for any administrative action deemed appropriate by Command

d. On 26 February 1993, the applicant’s immediate commander notified the applicant that he was initiating actions to separate him from service under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-12c, for misconduct – commission of a serious offense. The commander cited the applicant’s assault consummated by a battery, intentionally inflicting grievous bodily

harm on 27 December 1992; assault consummated by a battery on 10 October 1992, 17 June 1992, and 17 April 1992; and his conviction by the Municipality of Anchorage Court of assault on 17 July 1992 and on 11 January 1993. The applicant acknowledged receipt of the notification memorandum the same day.

e. On 2 March 1993, the applicant consulted with counsel and was advised of the basis for the contemplated actions to separate him under the provisions of Army Regulation 635-200, Chapter 14, and its effect; of the rights available to him; and of the effect of any action taken by him to waive his rights. He voluntarily waived consideration of his case by an administrative separation board contingent upon receiving no less favorable than a general under honorable conditions discharge. He acknowledged he may encounter substantial prejudice in civilian life if he received a less than honorable discharge. He elected not to submit a statement in his own behalf.

f. The commander initiated separation action against him under chapter 14 of AR 635-200. On 3 March 1993, the applicant's battalion commander recommended approval of his elimination. He recommended a UOTHC discharge, and further stated the following:

- The Soldier has a history of serious spouse abuse
- On 17 July 92 he was convicted by the Municipality of Anchorage of assaulting his wife and received a jail sentence
- On 11 January 1993 he was convicted by the Municipality of Anchorage of assaulting his wife and received a jail sentence. This was after I had personally counseled him to stay away from his wife
- The Soldier, to our knowledge, has committed spouse abuse on four different occasions. All efforts to reform him have failed
- His counseling files show that he is a substandard performer who does not lead by example

g. On 5 March 1993, the applicant's brigade commander recommended approval of his separation. He also recommended a UOTHC discharge.

h. On 30 June 1993, he voluntarily waived consideration of his case by an administrative separation board. He acknowledged this could result in a UOTHC separation, and he was making this request of his own free will and had not been subjected to any coercion.

i. A DA Form 2627, dated 13 July 1993 shows he received nonjudicial punishment under the provisions of Article 15, UCMJ for behaving with disrespect towards his superior officer. His punishment included reduction to sergeant (SGT)/E-5.

j. On 23 July 1993, consistent with the chain of command's request, the separation authority approved the recommended discharge. He further directed that the applicant be reduced to the lowest enlisted grade and be issued a UOTHC discharge.

k. The applicant's DD Form 214 shows he was discharged on 6 August 1993, under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct – commission of a serious offense. He was assigned Separation Code JKQ and Reentry Code 3. He completed 13 years, 1 month, and 26 days of net active service this period. This document also shows in:

l. On 13 March 1997, the Army Discharge Review Board (ADRB) denied his request for recharacterization of his service. The ADRB found that the reason for his discharge and the characterization were both proper and equitable. The complete case is available for the Boards review.

m. On 9 April 2021, the ABCMR also denied him an upgrade of his character of service. The Board found insufficient evidence of in-service mitigation and the applicant did not provide evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of evidence, the Board determined there was no error or injustice and therefore no basis upon which to grant relief. However, the Board did direct an amendment of his DD Form 214 to show completion of his first term of service and continuous honorable service.

n. On 27 April 2022, the applicant was issued a DD Form 215 (Correction to DD Form 214 Certificate of Release or Discharge from Active Duty), that reflects:

- item 18 (Remarks) add: "Soldier has completed first full term of service"
- item 18 (Remarks) add: "Continuous honorable active service from 800610 until 890906"

6. MEDICAL REVIEW:

a. The applicant requests reconsideration of his previous request to upgrade of his UOTHC discharge characterization to Honorable. He contends his misconduct was related to Other Mental Health Issues.

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 10 January 1980; 2) He accepted NJP under provisions of UCMJ Article 15 on 13 November 1992 for FTR; 3) On 26 February 1993, the applicant's immediate commander notified the applicant that he was initiating actions to separate him from service under the provisions of AR 635-200 Chapter 14-

12c, for misconduct – commission of a serious offense. The commander cited the applicant's assault consummated by a battery, intentionally inflicting grievous bodily harm on 27 December 1992; assault consummated by a battery on 10 October 1992, 17 June 1992, and 17 April 1992; and his conviction by the Municipality of Anchorage Court of assault on 17 July 1992 and on 11 January 1993. The applicant acknowledged receipt of the notification memorandum the same day; 4) On 2 March 1993, the applicant consulted with counsel and was advised of the basis for the contemplated actions to separate him under the provisions of Army Regulation 635-200, Chapter 14, and its effect; 5) On 3 March 1993, the applicant's battalion commander recommended approval of his elimination. He recommended a UOTHC discharge and cited multiple instances of the applicant assaulting and battering his spouse, substandard performance, and failed attempts at reform; 6) On 23 July 1993, consistent with the chain of command's request, the separation authority approved the recommended discharge. The applicant was discharged on 6 August 1993, accordingly.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Included in the applicant's casefile is a Report of Mental Status Evaluation, dated 11 February 1993, that shows the applicant underwent a Chapter 14 evaluation. The evaluator noted that the applicant's evaluation was within normal limits, that evidence suggest he was prone to disrupt the cohesiveness of the unit's functioning, if allowed to remain in the military, and that he was psychiatrically cleared for any administrative action deemed appropriate by command. No other military related BH records were provided for review. A review of JLV was void of any treatment history for the applicant and he does not have a SC disability. No civilian BH records were provided for review.

d. The applicant requests reconsideration of his previous request to upgrade of his UOTHC discharge characterization to Honorable. He contends his misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no documentation supporting his contention of Other Mental Health Issues. In absence of documentation supporting the applicant's assertion, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on medical mitigation.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

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 contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no documentation supporting his contention of Other Mental Health Issues. In absence of documentation supporting the applicant's assertion, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on medical mitigation.

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 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. The applicant was separated for commission of a serious offense with the commander citing his misconduct as two assaults consummated by a battery, intentionally inflicting grievous bodily harm, and his conviction by civil court of assault. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned by his commander during separation. The Board noted the applicant provided no documentation to support his request, including post-service achievements or letters of reference to support clemency. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation and corresponding narrative reason for separation were appropriate.

2. 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:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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 amendment of the ABCMR decision rendered in Docket Number AR20200008321 on 9 April 2021.

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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 15-185 (ABCMR) states ABCMR members will review all applications that are properly before them to determine the existence of an error. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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. 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 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. A UOTHC discharge was normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.
3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities for separating Soldiers from active duty and the separation codes to be entered on the DD Form 214. Separation Code JKQ is assigned to enlisted Soldiers separating due to misconduct, serious offense in accordance with chapter 14-12c of AR 635-200. The SPD/RE Code Cross Reference Table included in the regulation establishes that RE code "3" is the proper code to assign members separated with separation code "JKQ."
4. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) provides that an RE code is not upgraded unless it was administratively incorrect when originally issued.

a. RE code "1" applies to personnel who have completed their obligated term of active service and are considered qualified to reenter the U.S. Army if all other criteria are met.

b. RE code "3" applies to personnel who are not considered fully qualified for reentry or continuous service at time of separation, but whose disqualification is waivable. They are ineligible unless a waiver is granted.

c. RE code "4" applies to personnel separated from last period of active duty service with a nonwaivable disqualification.

5. 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 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.

6. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service 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. Boards for Correction of Military/Naval Records 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.

8. 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.

//NOTHING FOLLOWS//