

IN THE CASE OF: ██████████

BOARD DATE: 24 April 2024

DOCKET NUMBER: AR20230010107

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) characterization of service to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement, 5 June 2023

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 was young and went through a lot while on active duty. He believes he suffers from memories, anxiety, and post-traumatic stress disorder (PTSD) that started and got worse during his military service. He was a cannoneer crewmember who also suffered from bronchial and back problems, which were caused by his lifting and exposure to dust and smoke and handling of gunpowder in the field. He has submitted claims with the Department of Veterans Affairs (VA) for service-connected PTSD. His last claim, which he appealed, was denied. He currently has a 10 percent (%) VA rating but feels it should be more, so he is trying again to open his claims. He asks the board to grant him relief because his undiagnosed PTSD was the reason for his discharge, and his discharge should have been coded as undiagnosed PTSD. On his DD Form 149, the applicant indicates disability and performance/evaluations derogatory information are related to his request; however, he provides no further details on these issues.

3. The applicant enlisted in the Regular Army on 17 October 1989, for 3 years and 15 weeks. The highest rank/grade he held was private/E-2.

4. The applicant accepted non-judicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice, on three occasions:

a. On 5 April 1990, for disobeying a lawful order and being disrespectful in deportment toward a noncommissioned officer, on or about 30 March 1990. His punishment was forfeiture of \$168.00 pay for one month and restriction.

b. On 3 May 1990, for breaking restriction, on or about 13 April 1990. His punishment was reduction to private/E-1, forfeiture of \$362.00 pay per month for two months (forfeiture of \$362.00 for one month was suspended for 60 days), 45 days extra duty and restriction.

c. On 4 June 1990, for disobeying a lawful order from a noncommissioned officer, on or about 17 May 1990. His punishment was forfeiture of \$168.00 pay for one month.

5. The applicant received formal counseling on three occasions between 18 April 1990 to 9 July 1990 for:

- not being at his appoint place of duty
- failure to follow instructions
- substandard appearance and being unprepared for room and wall locker inspection

6. On an undisclosed date, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation 635-200 (Personnel Separations-Enlisted Personnel), Chapter 13, separation for unsatisfactory performance.

7. On 18 July 1990, the applicant acknowledged receipt of his commander's notification. He consulted with counsel and was advised of the reason for separation and the rights available to him. He understood if he was issued a general discharge, he may encounter substantial prejudice in civilian life. He elected to submit a statement in his own behalf, however his statement is not available in his records for review.

8. On an undisclosed date, his commander formerly recommended the applicant's separation from the service. As reasons for the proposed action, the commander cited the applicant's three NJPs and the bad example the applicant was to the troops in his unit.

9. The separation authority approved the recommended discharge and directed the issuance of a General Discharge Certificate.

10. The applicant was discharged accordingly on 23 August 1990, under the provisions of Army Regulation 635-200, Chapter 13, for unsatisfactory performance, with an under honorable conditions (general) characterization of service in the grade of E-1. He

received a separation code of "JHJ" and a reentry code of "3." He completed 10 months and 7 days of net active service during the period covered.

11. The applicant petitioned the Army Discharge Review Board (ADRB) for upgrade of his service characterization. On 23 August 1994, after careful consideration the ADRB determined he was properly and equitably discharged.

12. Regulatory guidance in effect at the time provided the service of Soldier's separated because of unsatisfactory performance under the provisions of Army Regulation 635-200, Chapter 13 would be characterized as honorable or under honorable conditions.

13. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his character of service to honorable. He contends he experienced PTSD 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 17 October 1989; 2) The applicant accepted non-judicial punishment (NJP) on three occasions between April-June 1990 for disobeying a lawful order (X 2) and breaking restriction (X 1); 3) The applicant received formal counseling on three occasions between April-July 1990 for not being at his place of duty, failure to follow instructions, and substandard appearance and being unprepared; 4) The applicant was discharged on 30 September 1994, Chapter 13-for unsatisfactory performance with an under honorable conditions (general) characterization of service. He completed 10 months and 7 days of active service; 5) On 23 August 1994, the ADRB reviewed and denied the applicant's request for an upgrade of his discharge.

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 electronic medical record (JLV) was also examined.

d. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant was exposed to a traumatic event while on active service, and there was insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

e. A review of JLV provided evidence the applicant had been engaged in the VA since 2003. He initially denied experiencing mental health symptoms for many years but received physical care. He underwent a Compensation and Pension evaluation for Mental Health Conditions in 2019. The applicant reported experiencing PTSD, but there was insufficient evidence the applicant had experienced a potentially traumatic event or was consistently diagnosed with PTSD. He had been diagnosed Unspecified Depression with Anxious Distress due to his current reported symptoms from 2012-2019. The applicant has continued to receive support from the VA for homelessness and mental health and physical concerns. He completed another Compensation and Pension Evaluation for Mental Health Conditions in 2023. Again, he was not diagnosed with PTSD, but he was evaluated to be currently experiencing an Anxiety Disorder related to his experiencing in the military (50% SC).

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he was experiencing undiagnosed PTSD while on active service. The VA has diagnosed the applicant with currently experiencing an anxiety disorder related to his reported experiences during his active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing undiagnosed PTSD while on active service. The VA has diagnosed the applicant with currently experiencing an Anxiety Disorder related to his reported experiences during his active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. He has, in 2023, been diagnosed with currently experiencing an Anxiety Disorder related to his reported experiences during his active service. The applicant was in active service for less than one year, and there was insufficient evidence he experienced a potentially traumatic event. There was sufficient evidence he was having difficulty adapting to the military. However, there is insufficient evidence the applicant was experiencing PTSD at the time of his active service, which mitigates his misconduct which resulted in his discharge for unsatisfactory performance and under honorable conditions (general) characterization of service. Yet, the applicant contends PTSD 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 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 and available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct. The Board noted the opine review that there is insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct. The Board found the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 10 months and 7 days of net active service during the period covered. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The applicant was discharged for unsatisfactory performance 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. As such, the Board denied relief.

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 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.

5/6/2024

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CHAIRPERSON  


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, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
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. Chapter 13 provided for separation due to unsatisfactory performance when in the commander's judgment the individual would not become a satisfactory Soldier; retention would have an adverse impact on military discipline, good order and morale; the service member would be a disruptive influence in the future; the basis for separation would continue or recur; and/or the ability of the service member to perform effectively in the future, including potential for advancement or leadership, was unlikely. Service of Soldiers separated because of unsatisfactory performance under this regulation would be characterized as honorable or under honorable conditions.

b. 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.

c. 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.

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 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 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 to those conditions or experiences.

5. 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 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, 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.

//NOTHING FOLLOWS//